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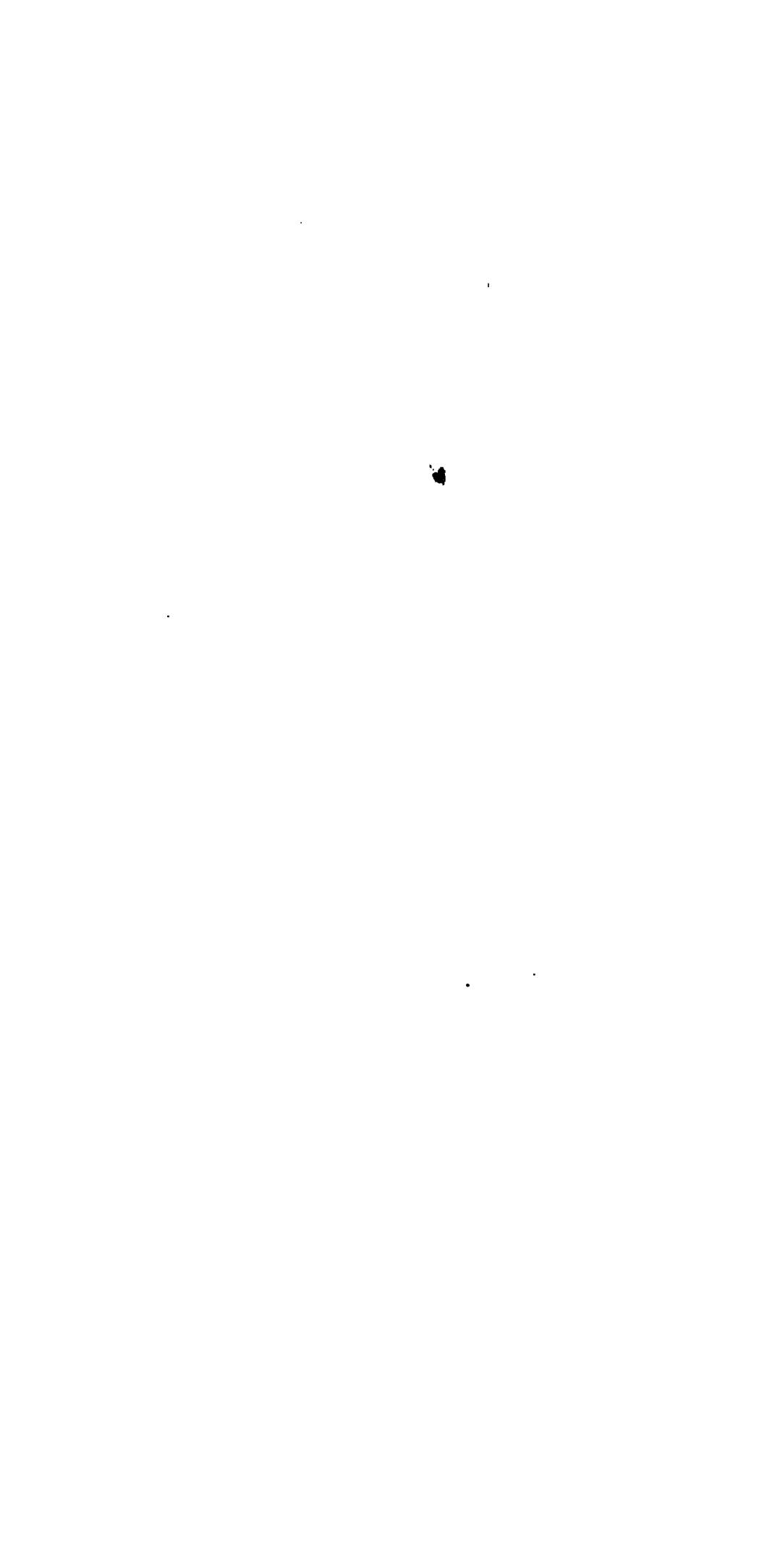


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*to York (State). Statutory Revision is
mission.*

HIGHWAY MANUAL

OF THE

STATE OF NEW YORK

A COMPLETE COMPILATION OF ALL THE LAWS
RELATING TO HIGHWAYS

WITH

ANNOTATIONS AND FORMS,

INCLUDING AN APPENDIX, CONTAINING FACTS, STATISTICS, INFORMATION AND SUGGESTIONS AS TO THE CONSTRUCTION OF STATE ROADS, AND THE DUTIES OF HIGHWAY OFFICERS.

OFFICIAL EDITION.

COMPILED AND PUBLISHED BY

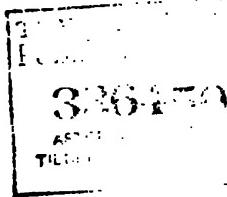
CHARLES H. BETTS,

CHIEF OF REVISION DEPARTMENT, NEW YORK STATE ASSEMBLY,
IN ACCORDANCE WITH CHAPTER 536,
OF THE LAWS OF 1904.

1904

JULY 1
1904

RECEIVED
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1904



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ACT AUTHORIZING PUBLICATION AND DISTRIBUTION OF COMPILATION OF HIGHWAY LAWS.

L. 1904, Chap. 536.

AN ACT to provide for the publication and distribution of a compilation of the highway laws without expense to the state.

Became a law May 3, 1904, with the approval of the Governor. Passed, a majority being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The secretary of state shall, within ten days after this act takes effect, designate a proper person to prepare and publish, on or before August first, nineteen hundred and four, a revised edition of the highway manual of the state of New York, heretofore published pursuant to chapter six hundred and fifty-five of the laws of eighteen hundred and ninety-three, which manual shall contain all the laws of the state relating to the construction, maintenance and use of highways, and the powers, duties and liabilities of highway officers. Such manual shall also contain such practical suggestions and directions for grading and building roads, maintaining and improving the same, and removing obstructions therefrom as the compiler may determine, or as the state engineer and surveyor may suggest.

§2. The person so designated to prepare and publish such compilation shall forward to each county clerk as many copies thereof as are required for distribution by this section. Each county clerk, upon the receipt of such manuals, shall immediately distribute one copy to each member of a town board, commissioner of highways and overseer of highways in his county. The cost of such manuals shall be fixed by the compiler, not exceeding one dollar per copy, which, together with the expense of distribution by the county clerk, shall be a town charge, and

shall be audited and allowed as other town charges at the next meeting of the town board. Such manuals shall remain the property of the town, and upon the expiration of the term of office of each officer shall be turned over by him to his successor in office. The cost of such manuals to all other persons shall not exceed one dollar and fifty cents per copy.

§3. Each supervisor shall, on or before March fifteenth, nineteen hundred and five, pay to the person designated to compile such manual the amount due for the books forwarded to his town. From the moneys so received the compiler shall pay the expense of preparing and publishing such compilation, and forwarding the same to the several county clerks as herein provided.

§4. This act shall take effect immediately.

STATE OF NEW YORK.
Office of the Secretary of State, } ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

JOHN F. O'BRIEN,
Secretary of State.

DESIGNATION OF COMPILER.

STATE OF NEW YORK,
Office of the
SECRETARY OF STATE,

Albany, May 10, 1904.

Charles H. Betts, Lyons, Wayne County, N. Y.:

Dear Sir—You are hereby designated to compile and publish the Highway Laws of this State, as provided by chapter 536 of the Laws of 1904.

Yours respectfully,

JOHN F. O'BRIEN,
Secretary of State.

PREFACE.

"The roads of a country are accurate and certain tests of the degree of its civilization. Their construction is one of the first indications of the emergence of a people from the savage state; and their improvement keeps pace with the advance of the nation in numbers, wealth, industry and science. Roads are the veins and arteries of the body politic, for through them flow the agricultural productions and the commercial supplies which are the life blood of the State."—*Gillespie*.

This manual is published in pursuance of chapter 536 of the laws of 1904. Under this act the secretary of state designated the undersigned to prepare and publish a revised edition of the Highway Manual of the State of New York heretofore published pursuant to chapter 635 of the laws of 1893. The act provides that the manual shall contain "all the laws of the state relating to the construction, maintenance and use of highways, and the powers, duties and liabilities of highway officers."

Owing to the great changes made in the laws pertaining to highways and bridges in this state subsequent to the publication of the Highway Manual in 1893, it has been found impracticable to follow the form and method adopted by the compilers of that edition. The manual here presented is, therefore, much more than a mere revised edition of the former manual. The method of treatment is entirely different, and the subject matter is more complete.

The statutory laws pertaining to highways and bridges and the duties of highway officers in respect thereto are included exactly as they appear in the statutes. All these statutes are grouped under chapter headings for convenience of reference. The main purpose of the manual is to aid highway officers in the performance of their duties. To attain this purpose the provisions of the statutes in common use by such officers have been carefully annotated with explanatory notes and supplemented by simple and useful forms. Wherever the courts have construed or applied the provisions of the statute reference is made to the cases in their proper connection so that persons using the manual may have at hand both statutory and court-made law to aid them in securing the information which they desire.

Special effort has been made by the use of cross references and explanatory notes to straighten out apparent inconsistencies and to make clear the exact state of the law in respect to each proposition. The compiler sincerely hopes that he has succeeded in his endeavors in this respect.

It will be noticed that the highway law, (L. 1890, chap. 568), which is the basis of all the laws pertaining to highways and bridges has been included in a chapter by itself, with the sections thereof double leaded, and separated from the explanatory notes and annotations immediately following each section. All the other supplemental and kindred statutes pertaining either directly or indirectly to highways and bridges have been grouped under appropriate chapter headings.

The facts, statistics and suggestions in the appendix of this work will be found invaluable for the guidance of highway commissioners and pathmasters. The article prepared by the State Engineer and Surveyor contains the most scientific information and the most practical suggestions relative to the construction of good roads that have ever been published.

The address of Senator William W. Armstrong, author of the state aid act; the address of Hon. Jean L. Burnett, author of the act appropriating \$1,500,000 for good roads and the address of Mr. Lyon, an acknowledged expert on the subject of good roads, are all interesting and instructive and they contain the best thought and most up-to-date information obtainable on a subject that is fast becoming one of the most vital and important subjects of state administration.

CHARLES H. BETTS,
Lyons, N. Y.

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HIGHWAY MANUAL

OF THE
STATE OF NEW YORK.

CHAPTER I.

Commissioners of Highways.

§ 1. **Election and term of office.**—Each town is required to elect at each biennial town meeting one, two or three commissioners of highways, (Town Law, § 12). The term of office of such commissioners of highways is two years, (Town Law, § 13). Whenever the time of holding town meetings in any town is changed to general election day, the commissioners elected thereat take office on the first day of January succeeding their election; except that where a town adopts a proposition for the holding of town meetings on general election day as provided in section 43 of the Town Law, the term of office of commissioners elected thereat is for two years from the date of their election. Where a commissioner of highways is elected at a biennial town meeting “held at any time between the first day of February and the first day of May, he shall, in case a board of supervisors thereafter adopts a resolution changing the time of holding such biennial town meetings to the first Tuesday after the first Monday in November, hold office until the first day of January, succeeding the biennial town meeting first held pursuant to such a resolution.” (Town Law, § 13). Under this provision a highway commissioner who is elected at a biennial town meeting held in the spring, may, if the board of supervisors adopts a resolution changing the time of holding town meetings from the spring to the fall, continue in his office

until the first day of January succeeding the time when his term would have expired except for the adoption of such resolution.

Villages constituting separate highway districts.—Section 38 of the Town Law provides that “when any town shall have within its limits an incorporated village, constituting a separate road district, exempt from the supervision and control of the commissioners of highways of the town, and from payment of any tax for the salary or fees of such commissioners, and from the payment of any tax for the opening, erection, maintenance and repair of any highway or bridge of said town, without the limits of said village, no residents of such village shall vote at any biennial or special election in such town for any commissioner of highways for said town, nor for or against any appropriation for the opening, laying out, maintenance, erection and repair of any highway or bridge in said town, without the limits of said village.” This section does not apply to a village which constitutes under the law a separate highway district, unless it is also exempt from highway taxes for the general maintenance of highways in the town. It is only in special cases that villages are so exempt. Electors in villages incorporated under the general village law may vote for highway commissioners, and are eligible to such offices. Opinion of Attorney General, 1898, p. 104.

§ 2. Holding over after expiration of term.—Where a commissioner of highways has duly entered on the duties of his office, he shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms, shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by the death or removal of his predecessor holding over, shall be for the residue of the term (§ 5). Except for the

authority conferred by this section a commissioner of highways would not be permitted to hold his office after the expiration of his term. *People v. Tiernan*, 30 Barb. 193, 8 Abb. 359. The word "qualified" as used in this section of the Public Officers' Law means to take an oath of office, and to file an official undertaking as required by law. *People ex rel Williamson v. McKinney*, 52 N. Y. 374, 380. So where a commissioner of highways, who has been duly elected, fails to qualify by filing his official oath of office and undertaking the commissioner in office at that time continues therein until the vacancy is filled as provided by law.

§ 3. Commissioners of highways; number of, how determined.

—The electors of such town may at their biennial town meeting, determine by ballot whether there shall be elected in their town one, two or three commissioners of highways. Whenever any town shall have determined upon having two or three commissioners of highways and shall desire to have but one, the electors thereof may do so by a vote by ballot taken at a biennial town meeting, and when such proposition shall have been adopted no other commissioner shall be elected or appointed until the term or terms of those in office, at the time of adopting the proposition shall expire or become vacant and they may act until their terms shall severally expire or become vacant as fully as if two or three continued in office. When there shall be but one commissioner of highways in any town, he shall possess all the powers and discharge all the duties of commissioners of highways as prescribed by law. In towns of less than two square miles in area, where five-sixths of the territory shall consist of an incorporated village or villages, the office of highway commissioner is hereby abolished and the powers and duties heretofore performed by him shall devolve upon the town board of such town together with such further power and authority

over highways, streets and bridges as are now possessed by or that may be hereafter granted to boards of trustees of villages of the third class. The provisions of this act shall not affect or abridge the term of office of any highway commissioner elected prior to the passage of this act. (Town Law § 15, as amended by L. 1903, chap. 57.).

Submission of proposition; application for vote.—Where propositions are to be voted upon by ballot at a town meeting, a written application for the submission of such a proposition, plainly stating the question to be voted upon, should be filed with the town clerk at least twenty days before the town meeting. The town clerk is then required, at the expense of the town, to give at least ten days' notice, posted conspicuously in at least four of the most public places in the town, of such proposed question, and that a vote will be taken by ballot at the town meeting mentioned, (Town Law, § 32.) Where it is proposed to change the number of commissioners of highways an application for the submission of a proposition therefor should be directed to the town clerk, should be signed by the electors desiring the submission of such proposition, should state plainly the question desired to be voted upon, and should request a vote thereon at a town meeting specified therein. The form of such application may be as follows:

FORM NO. 1.

Application for Submission of Proposition as to Number of Commissioners of Highways.

To A. B., town clerk of the town of....., county of.....:

The undersigned, electors of the town of....., hereby make application pursuant to the provisions of section 32 of the Town Law, for the submission of a proposition at the biennial town meeting to be held in such town on the.....day of....., 19...., upon the following question: Shall there be hereafter elected in the town of....., commissioners of highways? And said applicants hereby request that a vote be taken upon such proposition at such town meeting.

Dated this.....day of....., 19....

C. D.
F. G. etc.

§ 4. Qualifications.—a. Eligibility.—Every elector of a town is eligible to the office of commissioner of highways, (Town Law, § 50). No person shall be capable of holding the office of commissioner of highways who shall not at the time he shall be chosen, or ' ' ' which the electors electing him reside, or

a resident of the state, a resident of the town for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised, (Public Officers' Law, § 3).

b. **Oath of office.**—Every person elected or appointed to any town office, except justice of the peace, shall before he enters on the duties of his office, and within ten days after he shall be notified of his election or appointment, take and subscribe before some officer authorized by law to administer oaths in his county, the constitutional oath of office, and such other oath as may be required by law, which shall be administered and certified by the officer taking the same without reward, and shall within eight days be filed in the office of the town clerk, which shall be deemed an acceptance of the office; and a neglect or omission to take and file such oath, or a neglect to execute and file, within the time required by law, any official bond or undertaking, shall be deemed a refusal to serve, and the office may be filled as in case of vacancy. (Town Law, § 51.)

Section 10 of the Public Officers' Law is to the same effect. Under the above section a commissioner of highways is required within ten days after he shall be notified of his election or appointment to take and subscribe the constitutional oath of office. Such oath is prescribed by the Constitution (Const., art. 13, § 1), as follows: "I do solemnly swear, (or affirm), that I will support the constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of commissioner of highways according to the best of my ability." (If the commissioner was elected to the office the oath must also contain the following clause). "And I do further solemnly swear, (or affirm), that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to such office, and have not made any promise to influence the giving or withholding of any such vote." Such

oath may be taken before a justice of the Supreme Court, county judge, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, justice of the peace, notary public, or commissioner of deeds.

It is also provided that a town officer may administer any necessary oath in any matter or proceeding lawfully before him, or to any paper to be filed with him as such officer. (Town Law § 56). Since the oath of office of a commissioner of highways is to be filed with the town clerk, it is probable that such oath may be taken before the town clerk.

The Constitution provides that no other oath, declaration or test shall be required as a qualification for any office of public trust, (Const., art. 13, § 1), so that notwithstanding the provisions of section 51 of the Town Law, it is not permissible to exact of a commissioner of highways any other oath.

A failure of a commissioner of highways to take and file the oath of office before entering upon his duties is a misdemeanor, (Penal Code, § 42). Notwithstanding the commissioner's failure to take the oath of office, he is an officer *de jure*, and may perform the duties of his office; the courts holding that the provisions of the statute compelling an officer to file an oath are not self-executing and do not work a forfeiture of the office, but that such forfeiture must come from some act, judicial or otherwise, which effectually ousts the officer. *Horton v. Parsons*, 37 Hun. 42, 45; *Foote v. Stiles*, 57 N. Y. 399.

The filing of an official oath constitutes an acceptance of the office, and an omission to take and file such oath is a refusal to serve, and the office may be filled as in the case of vacancy. The law contemplates two steps by a commissioner elected to office. The first to be taken is the filing of his oath of office. When that has been done the office is deemed to have been accepted, and that is equivalent to saying that the officer elect has entered upon his duties. It is after so entering upon his office, and within a specified time thereafter, that he is required to execute and submit his undertaking. That he is regarded as in office when he has filed his oath is perfectly clear from the provision that neglect to file the oath within the prescribed time causes a vacancy. When he has evidenced in the required manner his acceptance of the office to which he was elected, his predecessor is out. *Matter of Bradley*, 141 N. Y. 527, 36 N. E. 598.

c. **Undertaking.**—Every commissioner of highways shall, within ten days after the notice of his election or appointment, ex-

ecute an undertaking with two or more sureties, to be approved by the supervisor of his town, to the effect that he will faithfully discharge his duties as such commissioner, and within ten days after the expiration of his term of office, pay over to his successor all moneys remaining in his hands as such commissioner, and render to such successor a true account of all moneys received and paid out by him as such commissioner, which undertaking shall be delivered to the supervisor, and filed by him in the office of the town clerk within ten days thereafter. (Town Law, § 63.)

Form of undertaking and liability thereon.—Every undertaking of a commissioner of highways must be executed by such officer and his sureties, and acknowledged or proven and certified in like manner as deeds to be recorded, and the approval indorsed thereon. The parties executing such undertaking shall be jointly and severally liable, regardless of its form in that respect for the damages to any person or party by reason of a breach of its terms, (Town Law, § 66).

Conditions generally affecting undertakings of commissioners.—The statute relating to the undertaking of a commissioner of highways does not specify the sum for which the undertaking is to be given. The undertaking is based upon the amount of money received by the commissioner and expended by him in the course of his official duties. If no sum be specified in the undertaking it will be deemed to be an undertaking for the amount received by the commissioner. It is proper, however, to include in the undertaking a specified sum for which the commissioner and sureties will be bound. If a sum be so specified in the undertaking, it shall not limit the liability of the sureties therein. (Public Officers' Law, § 11). It is required that every official undertaking be executed and duly acknowledged by at least two sureties, each of whom must add thereto his affidavit that he is a freeholder or householder within the state, stating his occupation and residence, and the street number of his residence and place of business if in a city, and a sum which he is worth over and above his just debts and liabilities and property exempt from execution. The aggregate of the sum so stated in such affidavit must be at least double the amount

specified in the undertaking. The failure to execute an official undertaking in the form or by the number of sureties required by or in pursuance of law, or by a surety thereto, to make an affidavit required by or in pursuance of law, or in the form so required, or the omission from such an undertaking of the approval required by or in pursuance of law, does not affect the liability of the sureties therein. (Public Officers' Law, § 11.)

Official duties not to be performed until undertaking is given.—A commissioner of highways must not receive any money or property as such officer or do any act affecting the disposition of any money or property which he is entitled to receive or have the custody of, before he shall have filed such undertaking; and any person having the custody or control of any such money or property shall not deliver the same to him until such undertaking is given. If he enters upon the discharge of any of his official duties before giving such undertaking the sureties upon his undertaking subsequently given for or during his official term shall be liable for all his acts and defaults done or suffered, and for all moneys and property received during such term prior to the execution of such undertaking, or if a new undertaking is given, from the time notice to give such new undertaking is served upon him. Every such official undertaking is obligatory and in force so long as the commissioner continues to act as such and until his successor shall be appointed and duly qualified, and until the conditions of the undertaking shall have been fully performed. When his undertaking is renewed pursuant to law, the sureties upon the former undertaking are not liable for any official act done or moneys received after the due execution, approval and filing of the new undertaking. (Public Officers' Law, § 12). The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held office during a preceding term, they are not liable for a defalcation which then occurred. In such case those who were sureties for the officer for the prior term must be looked to. *Bissell v. Saxton*, 26 N. Y. 55.

Form of undertaking.—The undertaking of the commissioner highways, the acknowledgement, and the justification of sureties may be in the following form:—

COMMISSIONERS OF HIGHWAYS.

9

FORM NO. 2.

Undertaking of Commissioner of Highways.

Whereas, A B, of the town of, county of, was on the day of, 19...., duly elected (or appointed) commissioner of highways of the town of in such county.

Now, therefore, we, the said A B and C D, residing at....., and E F, residing at, as sureties, do hereby, pursuant to section 63 of the Town Law, and other statutes made and provided, undertake and acknowledge ourselves, our heirs, administrators and executors, jointly and severally, firmly bound to and with the said town of.....in the sum of..... dollars, that the said A B, will faithfully discharge his duties as such commissioner of highways, and within ten days after the expiration of his term of office, pay over to his successor all moneys remaining in his hands as such commissioner, and render to such successor a true account of all moneys received and paid out by him as such commissioner, in accordance with law, or in default thereof, that we will pay all damages, costs and expenses resulting from such default, not exceeding the sum specified in this undertaking.

Dated this.....day of....., 19....

A B, Commissioner of Highways.
C D. } Sureties.
E F. }

STATE OF NEW YORK. } ss.:
County of

On the.....day of....., in the year 19...., before me, the subscriber, personally came A B, C D, and E F to me known to be the persons described in and who executed the within instrument, and severally acknowledged to me that they executed the said instrument.

G H,
(Official title.)

County of, ss.:

C D and E F, being severally and duly sworn, each for himself deposes and says: C D, That he is one of the sureties named in the foregoing undertaking; that he is a freeholder (a house holder) within the state of New York; that he is a by occupation, and resides in county of, at No. street (and has his place of business at..... street, in the city of); that he is worth the sum of dollars (twice the amount of the undertaking), over and above all just debts and liabilities and property exempt from execution; and E. F, that he is one of the sureties named in the foregoing undertaking; that he is a freeholder (or house holder) within the state of New York; that he is a by occupation and resides in county of, at No. street, in the city of; that he is worth the sum of dollars (twice the amount of the undertaking), over and above all joint debts and liabilities, and property exempt from execution.

Subscribed and sworn to before me,
this day of, 19....

C D. } Sureties.
E F. }

J K.
(Official title.)

I, the undersigned, supervisor of the town of do hereby approve of the foregoing undertaking as to its form, manner of execution and sufficiency of the sureties thereon.

Dated, 19....

D. F., supervisor, town of

§ 5. Resignation of commissioner.—Any three justices of the peace of a town may, for sufficient cause shown to them, accept the resignation of any town officer of their town; and whenever they shall accept any such resignation, they shall forthwith give notice thereof to the town clerk of the town. (Town Law, § 64.)

It is also provided in the Public Officers' Law, § 21, that town officers may resign their offices by a written instrument addressed to the town clerk. The above section of the Town Law provides for an acceptance of the resignation of a highway commissioner by any three of the justices of the peace. It may be that under such section the resignation does not take effect until so accepted, although under the above section of the Public Officers' Law it is provided that a resignation shall take effect upon the delivery to the officer to whom addressed at his place of business, or when it shall be filed in his office. It is also there provided that a delivery at the office or place of business or residence of a person to whom any such resignation may be delivered, shall be a sufficient delivery thereof.

Form of resignation.—Where the resignation is made to the justices of the peace as provided in the above section of the Town Law such resignation and notice thereof may be in the following form:—

FORM NO. 3.

Form of Resignation.

To E. F., G. H. & I. J., justices of the peace of the town of.....
in the county of.....

I, C. W., of the town of....., county of....., having been duly elected (or appointed) to the office of commissioner of highways in and for the said town of....., on the..... day of....., 19...., and having duly qualified as such officer, do hereby resign such office, for the following reasons: (Here specify reasons).

Dated this.....day of....., 19.....

Signed, C. W.

FORM NO. 4.

Notice of Acceptance of Resignation.

To C. D., town clerk of the town of.....:

You are hereby notified, pursuant to section 64 of the Town Law, that we, the undersigned, justices of the peace of the said town, have, for good cause shown, accepted the resignation of C. W. as commissioner of highways of said town.

ted, this.....day of....., 19.....

Signed, E. F.

G. H.

I. J.

Justices of the Peace.

§ 6. Removal of commissioner.—A commissioner of highways may be removed from office by the Supreme Court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of the town, and shall be made to the Appellate Division of the Supreme Court held within the judicial department embracing such town. Such application shall be made upon notice to such town officer of not less than eight days, and a copy of the charges upon which the application will be made must be served with such notice. (Public Officers' Law, § 25a, as added by L. 1896, ch. 573).

§ 7. Vacancies.—a. How created.—The office of commissioner of highways shall be vacant upon the happening of either of the following events before the expiration of his term:—(1) his death; (2) his resignation; (3) his removal from office; (4) his ceasing to be an inhabitant of the town; (5) his conviction of a felony or a crime involving a violation of his oath of office; (6) the judgment of a court declaring void his election or appointment, or that his office is forfeited or vacant; (7) his refusal or neglect to file his official oath or undertaking, if one is required, before or within fifteen days after the commencement of the term of office for which he is chosen, or if appointed to fill a vacancy within fifteen days after the notice of his appointment, or within fifteen days after the commencement of such term, or to file a renewal undertaking within the time required by law, or if no time be so specified, within fifteen days after notice to him in pursuance of law, that such renewal undertaking is required. (Public Officers' Law, § 20).

Forfeiture of office.—A commissioner of highways who is convicted of purchasing votes at the election at which he was elected forfeits his office, (Penal Code, § 410). If he ask or

receive bribes upon an agreement or understanding that his action upon any matter then pending or which may by law be brought before him in his official capacity shall be influenced thereby, he forfeits his office and is forever thereafter disqualified from holding any public office in this state. (Penal Code, § 45). And he also forfeits his office if he is convicted of receiving any gratuity or reward, or a promise thereof for appointing another person, or procuring for another person an appointment to a public office, (Penal Code, § 53); if he is convicted of permitting another person for any reward or consideration to perform any of his official duties, (Penal Code, § 54); if he is convicted of wilfully auditing or paying, or consenting to the audit or payment of a false or fraudulent claim against the town, (Penal Code, § 166).

b. Appointment to fill vacancies.—When a vacancy shall occur or exist in the office of commissioner of highways, the town board or a majority of them may, by an instrument under their hands and seals, appoint a suitable person to fill the vacancy, and the person appointed shall hold his office until the next biennial town meeting. The board making the appointment shall cause the same to be forthwith filed in the office of the town clerk, who shall forthwith give notice to the person appointed. (Town Law, § 65, as amended by L. 1897, ch. 481).

A special town meeting cannot be called for the filling of a vacancy in the office of highway commissioner, see People ex rel Hyde v Potter, 82 N. Y. Supp. 649. If there is a failure to elect a commissioner of highways at a biennial town meeting, in consequence of a tie vote, or otherwise, the town board may appoint a commissioner to hold office until the next annual election. People ex rel Simpson v VanHorne, 18 Wend. 515.

Form of appointment and notice of appointment.—The appointment to fill a vacancy in the office of commissioner of highways, and the notice of such appointment may be in the following form:

FORM NO. 5.

Appointment to Fill Vacancy in Office of Commissioner.

That a vacancy exists in the office of commissioner of highways, town of....., county of....., because of the (resig-

nation, or as the case may be)..... of M. N., who was elected to such office on the day of 19...., for a term of two years from the day of 19....;

Now, therefore, in pursuance of the power vested in us by section 65 of the Town Law, we, the undersigned members of the town board of such town, do hereby appoint N. O. of said town to fill the vacancy existing in such office of commissioner of highways; the said N. O. shall hold such office until the next biennial town meeting (*) in such town, and until his successor is elected or appointed and has qualified, as provided by law.

In witness whereof, we have hereunto set our hands and seals, at....., in said town, on the.....day of....., 19....

B. F., Supervisor. (L. S.)

(Add other signatures of members of the town board, with designation of office, and seals.)

*If town meetings are held at time of general election, the vacancy should be filled to the first day of January following the election.

FORM NO. 6.

Notice of Appointment to Office of Commissioner.

To N. O.:

You are hereby notified that you were appointed by the town board of the town of....., county of....., as commissioner of highways in and for the said town to fill the vacancy in that office occasioned by the (resignation or as the case may be) of M. N., the former incumbent of such office; such office is to be held by you until the next biennial town meeting of such town [(or), until and including the 31st day of December succeeding the next biennial town meeting.] Such appointment was duly executed by the members of said town board and filed in my office on the.....day of....., 19.... as provided by law.

Dated....., 19....

C. Z., Town Clerk.

§ 8. Delivery of books and papers by outgoing commissioner to his successor.—Whenever the term of office of any supervisor, town clerk, commissioner of highways or overseer of the poor shall expire, or when either of such officers shall resign, and another person shall be elected or appointed to the office, the succeeding officer shall, immediately after he shall have entered on the duties of his office, demand of his predecessor all the records, books and papers under his control belonging to such office. Every person so going out of office, whenever so required, shall deliver upon oath to his successor all the records, books and papers in his possession or under his control belonging to the office held by him, which oath may be administered by the officer to whom such delivery shall be made,

and shall, at the same time pay over to his successor the moneys belonging to the town remaining in his hands. If any such officers shall have died, the successors or successor of such officer shall make such demand of the executors or administrators of such deceased officer, and such executors or administrators shall deliver, upon the like oath, all records, books and papers in their possession, or under their control, belonging to the office held by their testator or intestate. If any person so going out of office, or his executors or administrators, shall refuse or neglect, when lawfully required, to deliver such records, books or papers, he shall forfeit to the town, for every such refusal or neglect, the sum of two hundred and fifty dollars; and officers entitled to demand such records, books and papers may compel the delivery thereof in the manner prescribed by law. (Town Law, § 84).

Proceedings to compel delivery of books and papers.—The following section of the Code of Civil Procedure provides the procedure for compelling a commissioner of highways to deliver the books and papers pertaining to his office to his successor:

A public officer may demand from any person in whose possession they may be, a delivery to such officer of the books and papers belonging or appertaining to such office. If such demand is refused, such officer may make complaint thereof to any justice of the supreme court of the district, or to the county judge of the county in which the person refusing resides. If such justice or judge be satisfied that such books or papers are withheld, he shall grant an order directing the person refusing to show cause before him at a time specified therein, why he should not deliver the same. At such time, or at any time to which the matter may be adjourned, on proof of the due service of the order, such justice or judge

will proceed to inquire into the circumstances. If the person d with withholding such books or papers makes affidavit such justice or judge that he has delivered to the officer books and papers in his custody which, within his knowledge or to his belief belong or appertain thereto, such pro-

ceedings before such justice or judge shall cease, and such person be discharged. If the person complained against shall not make such oath, and it appears that any such books or papers are withheld by him, such justice or judge shall commit him to the county jail until he delivers such books and papers, or is otherwise discharged according to law. On such commitment, such justice or judge, if required by the complainant, shall also issue his warrant directed to any sheriff or constable, commanding him to search, in the daytime, the places designated therein, for such books and papers, and to bring them before such justice or judge. If any such books and papers are brought before him by virtue of such warrant, he shall determine whether they appertain to such office, and if so shall cause them to be delivered to the complainant. (Code Civil Procedure, § 2471a, as inserted by L. 1893, ch. 179).

In proceedings to compel an officer to deliver books and papers to his successor, brought under the above section, all that the petitioner is required to establish is his election and that he has duly qualified; questions as to the validity of his election cannot be determined in such a proceeding. Matter of Bradley, 141 N. Y. 527.

§ 9. Compensation of commissioner.—The compensation of the commissioner of highways is fixed by subdivision 1 of § 178 of the Town Law, as amended by L. 1904, ch. 312, which reads as follows:

1. The supervisor, except when attending the board of supervisors, town clerk, assessors, justices of the peace and overseers of the poor, each two dollars per day, except that in any town where the assessed valuation of real estate is over twenty million dollars, the town board of such town may determine by resolution that the assessors shall receive each year a salary of not exceeding one thousand dollars in lieu of per diem compensation hereinbefore provided for, and except that the town board of any town may fix a different compensation for the assessors in their town, of not less than two nor more

than three dollars per day, each, and also except that in the county of Monroe, assessors shall be entitled to three dollars per day, and also, except that in the county of Nassau assessors and commissioners of highways shall be entitled to three dollars per day, and the town boards of the towns of and in said county of Nassau, having a population, as appears by the last federal census, of seventeen thousand inhabitants, or more, are hereby authorized and empowered to fix an annual compensation for the assessors and commissioners of highways of said towns, not to exceed twelve hundred dollars per annum each, and to provide for the payment of said compensation, in quarterly installments. The town board of any town may, at a regular meeting, fix the compensation of the commissioner of highways of such town at a sum of not less than two nor more than three dollars per day.

CHAPTER II.

The Highway Law.

L 1890, chap. 568.—An Act in relation to highways, constituting chapter 19 of the general laws.

(In effect March 1, 1890.)

CHAPTER NINETEEN OF THE GENERAL LAWS.

The Highway Law.

- Article I. Highway officers, their general powers and duties. (§§ 1-26.)
II. Assessment for highway labor. (§§ 30-59a.)
III. The duties of overseers of highways, and the performance of highway labor. (§§ 60-74.)
IV. Laying out, altering and discontinuing highways and laying out private roads. (§§ 80-123.)
V. Bridges. (§§ 130-145.)
VI. Miscellaneous provisions. (§§ 150-165.)
VII. The regulation of ferries. (§§ 170-174.)
VIII. County Supervision of highways. (§§ 180-189.)
IX. Repealing and other clauses. (§§ 200-203.)

ARTICLE I.

Highway Officers, Their General Powers and Duties.

- Section 1. Short title.
2. Treasurer of highway commissioners.
3. Powers of one commissioner.
4. General powers of commissioners.
5. Mile-stones and guide-boards.
6. Road machines and implements.
7. Stone-crushers and materials.
8. Custody of stone-crushers.
9. Additional tax.
10. Extraordinary repairs of highways or bridges.
11. Auditing expense thereof.
11a. Damages for change of grade.
12. Accounts, how made out.
13. Unsafe toll-bridge.
14. Drainage, sewer and water pipes in highways.
15. Actions for injuries to highways.
16. Liability of towns for defective highways.
17. Action by town against commissioners.
18. Audit of damages without action.
19. Reports of commissioners.
20. General duties of overseers.
21. Opening obstructed highways.
22. Penalties against overseers.
23. Penalties, how collected.
24. Compensation of overseers.
25. Division of towns into highway commissioner districts.
26. Duties of commissioner in each district.

§ 1. **Short title.**—This chapter shall be known as the highway law.

The Highway Law of 1890 consolidated and revised the prior legislation of the state upon the subject of highways and bridges. It was not strictly and solely a consolidation of prior statutes, for new provisions were engrafted on the antecedent law for the purpose of improving the highway system. *People ex rel Root v Board of Supervisors*, 146 N. Y. 107, 113. At the time of its enactment it purported to contain all the law relating exclusively to highways and bridges and the powers and duties of town officers in relation thereto. Many changes have been made since its enactment in the highway system by means of general acts not included as a part of the highway law. These acts will be treated in subsequent chapters, and references will be made to them, when necessary, in the notes to the sections of the highway law. Notwithstanding the many independent acts which have been passed relating to highways, the highway law is still the principal statute upon the subject. Its original form and substance have been greatly changed by subsequent amendment; but it remains the principal guide to the proper performance of the duties of highway officers.

§ 2. **Treasurer of highway commissioners.**—When there is more than one commissioner of highways in any town, they shall designate one of their number to be treasurer. If they fail so to do, the commissioner longest in office shall be the treasurer; and all money collected for highway purposes, or belonging to the highway fund of the town, shall be paid to him. Before receiving such money, he shall execute to the town an undertaking, to be approved by the supervisor, to the effect that he will faithfully account and pay over to any officer or person entitled thereto, any money that may come into his hands as such treasurer.

There may be one, two or three commissioners of highways in a town as determined by a vote of the electors. See Town Law, § 15, ante, p. 3. Where there are two or three commis-

sioners of highways the law contemplates that one of them should receive, pay out and be responsible for the money of the town collected for highway purposes. The commissioner acting as treasurer is required to execute an undertaking for the faithful accounting of the moneys received and paid out by him. The form of such undertaking may be as follows:

FORM NO. 7.**Undertaking of Commissioner Acting as Treasurer.**

Whereas, the commissioners of highways of the town of....., in the county of....., have designated A. B., one of their number to be treasurer, pursuant to section 2 of the Highway Law, now therefore we, the said A. B. and C. D., residing at..... and E. F., residing at....., as sureties, do hereby jointly and severally undertake, and acknowledge ourselves, our heirs, administrators and executors, jointly and severally, firmly bound to and with the said town of..... in the sum of....., that the said A. B. will faithfully account and pay over to any officer or person entitled thereto any money that may come into his hands as such treasurer.

Dated this..... day of..... 19....

A. B., Commissioner of Highways.
C. D.,
E. F.,

Sureties.

(Follow with acknowledgement, justification and approval as in Form No. 1, ante p.)

A town may be divided by the town board into two or three highway commissioner districts and one of such districts may be assigned to each commissioner. Highway Law, § 25, post. Where a town is so divided the moneys raised and collected from the town at large for highway purposes are to be apportioned and paid to each commissioner and expended by him on the highways in his district. Highway Law, § 26, post. In such case the above section of the highway does not apply, and no treasurer is appointed.

§ 3. Powers of one commissioner.—When any town has but one commissioner of highways, the term, commissioners of highways, when used in this chapter, shall mean such one commissioner.

The number of commissioners is determined as provided by Town Law, § 15, ante p. 3, and this section also provides that "when there shall be but one commissioner of highways in any town, he shall possess all the powers and discharge all the

duties of commissioners of highways as prescribed by statute." And under section 18 of the statutory construction law it is provided that "a reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding said office, when but one person is chosen to fill such office in pursuance of law."

Powers of majority.—Where three commissioners are elected, two of such commissioners may exercise any power or authority, or perform any duty of the board, provided the meeting at which such action is taken was duly called, or held on reasonable notice to all the commissioners. So also if a commissioner dies or becomes mentally incapable of acting, or shall refuse or neglect to attend a meeting, the two remaining commissioners may exercise the powers and perform the duties of the board. Statutory Construction Law, § 19. If, however, the offices of two of the commissioners, where there are three commissioners, become vacant, there seems to be no authority of law for the remaining commissioner to act for the board. And where there are two commissioners and the office of one becomes vacant, the other commissioner cannot bind the town generally, although under section 26 of the Highway Law, post, he may perform the duties of a commissioner in the highway commission district for which he was elected and has been assigned.

§ 4. General powers of commissioner.—The commissioners of highways in the several towns, shall have the care and superintendence of the highways and bridges therein, except as otherwise specially provided in relation to incorporated villages, cities and other localities; and they shall

1. Cause such highways and bridges to be kept in repair, and give the necessary directions therefor, and shall inspect the highways and bridges in each highway district between the first and fifteenth day of September in each year, or at such other time as the board of supervisors by resolution may prescribe. If it appears to him upon such inspection that the labor assessed in any highway district has not been

entirely performed therein, he shall transmit a statement to the supervisor of his town containing the number of days' labor which in his opinion have not been performed in such district, and a list of all persons and corporations owning property therein and the number of days of labor still to be performed by such persons and corporations. A notice of the transmission of such statement and of the day and place where the persons assessed for highway labor in such district may be heard before such supervisor, shall be posted in at least three conspicuous places in the road district affected by such statement. On the day and at the place specified in such notice, the supervisor shall hear all persons interested in the performance of labor on the highways in such district. After such hearing, the supervisor shall correct such list in accordance with the testimony and facts as they appear to him and shall make a return thereof to the board of supervisors in the same manner as unpaid taxes and unperformed labor are returned by the town board to the board of supervisors. The board of supervisors at its annual meeting in each year, shall cause the amount of arrearages for highway labor contained in such lists, estimating each day's labor at one dollar and fifty cents a day, to be collected from the property of the person or corporation specified in such list, in the same manner as arrearages for unperformed labor. (Amended by L. 1901, ch. 437 and L. 1902, ch. 75.)

In the administration of the highway system the commissioner of highways is an independent officer, exercising public power and charged with public duties, specially prescribed by law. While acting in that capacity, by virtue of powers conferred by statute he proceeds independently of any direction on the part of the town. On the other hand, he is without power to represent or affect the rights of the town in any other manner than prescribed by statute. *Flynn v Hurd*, 118 N. Y. 19, 27;

People ex rel Everett v Supervisors, 93 N. Y. 397. The commissioner is charged with the care, superintendence, repair and improvement of the highways and bridges within his town, and with the custody and disbursement for that purpose of whatever money is provided therefor. Berlin Iron Bridge Co. v Wagner, 57 Hun, 346.

No corporate duty is imposed upon towns in respect to the care, superintendence or regulation of highways within their limits. Ordinarily a commissioner of highways is not an agent of the town in its corporate capacity, and the town is not chargeable with his malfeasance, nonfeasance, or delinquencies. People ex rel Van Keuren v. Town Auditors, 74 N. Y. 310.

Highways to be kept in repair.—As to what are public highways see Highway Law, § 100, post p. A highway cannot be said to be opened and worked unless it is passable for its entire length. It must be opened as a highway over its entire route. It need not be worked in every part, but it must be worked sufficiently to be passable for public travel. Highways are for public use, to enable the public to pass and repass with teams and vehicles such as are ordinarily used; and when a highway laid out shall remain unopened and unworked for six years, the statute declares that it shall cease to be regarded as a highway for any purpose. The requirement to open and work a highway, implies that it must be made passable as a highway for public travel. It need not be a first class road; it need not be finished, but it must be sufficient to enable the public to pass over it. Beckwith v Whalen, 70 N. Y. 430, 435.

Duty of commissioner to repair.—It is made the duty of the commissioner of highways to keep the highways and bridges of his town in repair. In performing such duty he has discretionary power, and if he does not exceed his statutory authority, it will be assumed, unless the contrary appears, that he acted in good faith and according to the best of his judgment. People ex rel Slater v Smith, 83 Hun, 432. And he is also to be permitted to use his own judgment in determining whether repairs are necessary; there is no absolute and imperative duty to repair in a given case imposed upon him. Peck v Batavia, 32 Barb. 641. The question as to what constitutes negligence upon the part of the commissioner in failing to repair defective highways and bridges is hereafter considered. See Highway Law, § 16, post.

Directions to overseers.—This subdivision imposes upon the commissioner of highways the primary duty of causing the highways and bridges in his town to be kept in repair. Because the overseers appointed by the commissioner for the several highway districts are by statute required to keep in repair the highways in their respective districts, the commissioner is not thereby relieved from the duty of seeing that such highways are kept in a safe condition. *Farman v Town of Ellington*, 46 Hun, 41, affd 124 N. Y. 662; *Bryant v Town of Randolph*, 44 N. Y. H. Rep 86 affd 133 N. Y. 70; *Bartlett v Crozier*, 17 Johns, 437. In speaking of the relative duties of commissioners and overseers of highways the court in the case of *Farman v. Town of Ellington*, *supra*, said: "By the system thus provided by the statute for the ordinary repairs of the highways, exclusive of bridges over intersecting streams, the work is to be furnished through the action of the overseers, who are officers. They are to warn the inhabitants of their districts to do the work, and they are also to expend for the same purpose moneys derived by them from commutations and fines. It is through these means that the commissioner may by his directions cause such repairs to be made. And for a failure to perform any of the duties required of them by the statute, or which may be enjoined upon them by the commissioners of highways the overseers are subjected to a penalty. Their duty to make repairs does not depend upon the direction of the commissioners to do it. The statute charges them with it. But this does not relieve the commissioner from the duty of seeing that the roads are kept in suitable repair, and for that purpose to give the requisite directions to the overseers to use the means provided by the statute to supply the work necessary to do it, and to use reasonable diligence to see that his directions are executed, because upon him rests the care and supervision of the highways, and his negligence alone probably furnishes the remedy to those suffering injuries occasioned by their defective condition. * * * * In view of the superintending care imposed upon the commissioner, he should be required to use reasonable diligence to learn whether the overseer has proceeded with the performance of the work, and if he has not to take measures so far as he may, to enforce the execution of such direction."

Inspection of highways and bridges; unperformed labor.—The superintending duties of the commissioner, and his power to

compel a proper observance of the duties imposed by statute as to the performance of highway labor are emphasized by the provisions of the above subdivision relative to the inspection by him of highways and bridges, for the purpose of determining the number of days' labor, which in his opinion have not been performed in each highway district.

The following are forms of the statement to be made by the commissioner to the superior after such inspection, and of the notice of the transmission of such statement:

FORM NO. 8.

Statement as to Unperformed Highway Labor.

To D. L., Supervisor of the town of.....:

Upon an inspection made by me of the highways and bridges in each highway district in the town of....., between the 1st and 15th days of September, 19...., pursuant to sub. 1 of section 4 of the Highway Law, I find that, in my opinion, the labor assessed in the following highway districts has not been entirely performed therein. The following is a statement containing the districts in which such labor has not been performed and the number of days' labor which in my opinion are in arrears, and also a list of the persons and corporations owning property therein, and of the number of days' labor still to be performed by such persons and corporations:

District No. 1.

Total number of days' labor unperformed..... 120

Names of Property Owners.	Days' Labor Assessed.	Days' Labor Unperformed.
John Brown	31	9
(In the same manner as to other property owners.)		
Dated this day of, 19.....		

L. M.,
Commissioner of Highways.

FORM NO. 9.

Notice of Transmission of Statement.

Take notice:—

That the undersigned, commissioner of highways of the town of has this day transmitted to A. B., Supervisor of the town of, a statement containing the names of all property owners in the several highway districts in the town of who have been assessed for highway labor therein, and who in my opinion have failed to perform the full amount of the highway labor so assessed. The said A. B., Supervisor of the town of, will hear all persons assessed for the performance of labor on the highways in each of such districts at, in the village of, State of New York.

Dated, this day of, 19.....

L. M.,
Commissioner of Highways.

2. Cause such highways as shall have been laid out, but not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office;

As to what constitutes a highway, see Highway Law, § 100, post. It is provided in this section that highways which have been used as such for a period of twenty years or more become public highways. When commissioners of highways shall lay out highways they are required to cause a survey thereof to be made and incorporate the same in an order to be signed by them and to file the same in the office of the town clerk. Highway Law, § 81, post.

Effect of survey.—A survey made pursuant to the above subdivision, describing a road which has been used as a highway for more than twenty years will not have the effect to increase or change the width or location of the highway; it is effective only as a description of it as manifested by the permitted twenty years' use. *Ivory vs. Town of Deer Park*, 116 N. Y. 476. Where a highway has been dedicated to the public for the prescribed period of twenty years the commissioners may under the above subdivision cause a survey to be made thereof and remove fences and other encroachments within the limits of such highway. *James v. Sammis*, 132 N. Y. 239.

Where the commissioners of highways have ascertained and described a road as provided in this subdivision, their certificate is not a defense to an action against an overseer of highways for trespass, where such certificate did not purport to be based either upon a record or upon an adjudication of use for twenty years; and proof is admissible on behalf of the plaintiff that the road was not a public highway by use or dedication. *Kelsey vs. Burgess*, 12 N. Y. Supp. 169.

Private roads.—The duty of causing roads to be described and recorded evidently applies to such roads as have been previously laid out by public authority and imperfectly described, and to such as have been used as highways for twenty years; and does not apply to roads which have been laid out by individuals on their own lands. *City of Oswego v. Oswego Canal Co.* 6 N. Y. 257.

User for twenty years is not of itself sufficient to constitute a public highway. It must be associated with some act showing

such use to be claimed as a right hostile to, and independent of, the will of the owner, such as repairing the road or assuming its control in some ostensible manner. Harriman v. Howe, 78 Hun. 280.

3. From time to time, not oftener than once a year, divide the town into so many highway districts as they shall judge convenient, by writing, under their hands, to be filed with the town clerk, and by him to be entered in the town book, at least ten days before an annual town meeting. A territory not exceeding one square mile, containing a population of not less than one hundred and fifty, and not including a part of a city or village, may be established as a separate highway district in the following manner: A verified petition of two-thirds of the electors of such territory representing two-thirds of the taxable property therein and describing the territory, may be presented to the highway commissioner at least twenty days before the annual town meeting. The petition shall state the population of the proposed district, and the taxable persons and property as appears by the last preceding assessment roll of the town. A farm or lot shall not be divided in the formation of such district. Within ten days after the presentation of such a petition, the highway commissioner shall establish the district in the manner above required for other highway districts. The highway district so established shall not be abolished, except upon the petition or written consent of two-thirds of the electors representing two-thirds of the taxable property of the district. The highway commissioner may extend the highway district, so established not more than half a mile in any direction, and if it is so extended an order shall be entered accordingly. In a town which has adopted the money system of taxation for highway purposes the highway commissioner may divide such town into high-

way districts, whenever in his judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow.

(Amended by L. 1897, chap. 782 and L. 1904, chap. 611.)

The object of dividing a town into highway districts is to divide up among the several overseers of highways the labor that is to be performed, to the end that the highways in their respective districts may speedily receive the benefit of the labor assessed. *Chamberlain v. Taylor*, 36 Hun. 24, 37.

The number and boundaries of the highway districts are to be determined by the commissioners according to their own judgment. As was held in the case of *Tarrant v. Quackenbos*, 10 How. Pr. 237, the commissioners must divide the town into districts, but in the performance of this duty they act upon their own judgment and discretion. Where the labor system of working the highways is in force the duty is absolutely imposed upon the commissioners to divide the town into highway districts. The whole scheme of the law in respect to the assessment of highway labor contemplates the division of the town into such districts and the appointment of overseers therein.

If the money system of working the highways is in force the amendment to the above subdivision by the act of 1904 provides that the commissioner may divide the town into highway districts, whenever in his judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow.

Statement as to highway districts.—The commissioner of highways is required to file in the office of the town clerk a statement specifying the changes in the boundaries of the several highway districts of his town. It is provided that such division shall not be made oftener than once a year. The statute does not require the division to be made each year, but contemplates the action of the commissioner as often as he deems expedient, but not oftener than once in each year. So where a commissioner is satisfied with the division of his town into highway districts as it exists he is not required to make a new division. The following is a form of the statement which may be used by a commissioner in dividing his town into highway districts.

FORM NO. 10.

Statement of Commissioner as to Highway Districts.

The undersigned, commissioners of highways of the town of, in the county of, hereby divide the highways of said town into highway districts as follows:—

District No. 1 shall comprise, (here insert the description of the highways to be included in such district.)

(Follow in the same manner as to each highway district.)

And we hereby assign to each of said districts the inhabitants and corporations respectively residing or located therein, and liable under the statute to be assessed for highway labor on highways in such districts.

Dated, this day of, 19.....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

4. Assign to each of the highway districts such of the inhabitants and corporations liable to work on highways, or who are assessed for highway taxes thereon, as they shall think proper, having regard to proximity of residence as much as may be. (Amended by L. 1904, chap. 611.)

Assignment of labor.—The list of the taxable inhabitants of each district is to be filed by the overseers of highways in the office of the town clerk and delivered by the town clerk to the commissioners. (Highway Law, § 31, post.) The commissioners have power over all the highway labor of the town, and may assign it in such portions as they please to the different highway districts. In making such apportionment they are to have regard to the proximity of residence of those who are to perform the labor. *Tarrant v. Quackenbos*, 10 How. Pr. 287.

5. On the fifteenth day of April of each year, make and file with the town clerk, a written appointment of a resident of each district, to be overseer of highways therein. The town clerk shall notify each overseer of his appointment, within ten days after the filing thereof, and the person so appointed and notified, shall thereupon become and be the overseer of highways within his district for one year, and until his successor shall be appointed. If any person so appointed overseer, shall

refuse to serve or his office shall become vacant, the commissioners shall in like manner appoint some other person to be overseer. The board of supervisors of any county may, by resolution, adopted at an annual meeting of such board, fix another time when the appointment of such overseers of highways shall be made in that county. The overseers of highways appointed in highway districts in towns which have adopted the money system of taxation for highway purposes shall perform such duties in respect to the maintenance and repair of highways and the opening of highways obstructed by snow in the districts for which they are appointed, as are prescribed by the highway commissioners of such towns. (Amended by L. 1904, chap. 611.)

Duty to appoint overseer.—The duty imposed upon commissioners of highways by this subdivision to appoint overseers within the time prescribed in the statute is absolute. *People ex rel. Myers v. Barnes*, 114 N. Y. 317.

The appointment of overseers must be in writing and filed in the office of the town clerk. The town clerk is then required to notify, within 10 days after the filing, each overseer of his appointment. If a person chosen or appointed to the office of overseer of highways shall refuse to serve, he shall forfeit to the town the sum of \$10. (Town Law, § 55.)

The following forms of appointment and of notice to the overseer may be followed:

FORM NO. 11.
Appointment of Overseers.

The undersigned, commissioners of highways of the town of, in the county of, hereby appoint the following residents to be overseers of highways in their respective districts for the ensuing year, as follows.—

District No. 1:—J. K.

District No. 2:—L. M.

District No. 3:—T. W.

Dated this day of 19.....

Signed A. B.,

C. D.,

E. F.,

Commissioners of Highways.

FORM NO. 12.

Notice of Appointment.

To J. K.:

Please take notice that you have been appointed by the commissioners of highways of the town of overseer of highways for highway district No., in such town, for the ensuing year; and you are hereby required to deliver to the town clerk, pursuant to the provisions of section 31 of the Highway Law, within 16 days after receiving this notice, the names of all the taxable inhabitants and corporations in your highway district, liable to be assessed therein for highway labor.

Dated this day of 19.....

O. P.,
Town Clerk.

6. Require overseers of highways to warn all persons and corporations assessed to work on highways, to come and work thereon, with such teams and implements, and at such times as the said commissioners, or any one of them shall direct;

Under sections 60 and 61 of the Highway Law, post, the overseer of highways in each district is required to give notice to all residents of his district and to corporations assessed to work upon the highways therein of the time and place at which they are to appear for the performance of highway labor.

7. Expend all moneys raised and collected from the town at large for highway purposes, upon the highways and bridges situated in, or upon the borders of the town, or highway districts assigned to the town in which such moneys were raised and collected, in such proportion as they may deem just and proper;

The tax collector's warrant directs the collector to pay to the commissioners of highways of the town such sum as shall have been raised for the support of highways and bridges therein. (Tax Law, § 56.)

Expenditure of highway moneys.—Commissioners of highways are vested with the power of expending all moneys raised generally for highway purposes. As to how and where the money so raised should be applied, the discretion of the commissioners will control, but such discretion must be reasonably

exercised, and they cannot excuse an omission to expend a trifling amount in the repair of an apparent defect because they concluded or determined to expend the money for other purposes. *Ivory v. Town of Deer Park*, 116 N. Y. 476. But where the money system is adopted the moneys collected by tax and received from the state are to be paid to the supervisor and disbursed by him upon the order of the commissioners; such money is to be expended upon the highways as directed by the commissioners and the town board. *Highway Law*, § 53, as amended by L. 1904, chap. 478, post.

Commissioners themselves are charged with no duty in respect to the care of the highways of the town, save so far as they are furnished with the power to provide, or are previously provided with funds by the town to accomplish such purpose. The obligation imposed upon them to repair the highways and bridges is co-ordinate only with the means furnished as prescribed by statute, and there is no authority either expressly or by implication, for the incurring of any debt or obligation upon the part of the town. *People ex rel Everett v. Board of Supervisors*, 93 N. Y. 397. The amount expended by the commissioner must be limited to the amount raised as provided by statute and paid over to him to be used upon the highways and bridges. The commissioner cannot borrow money or give a promissory note and thereby bind either the town or his successor in office. *Van Alstyne v. Freday*, 41 N. Y. 174.

Highway commissioners have no power to pledge the credit of the town for materials for the repair of highways and bridges, and the persons furnishing such material have no claim therefor upon the town, notwithstanding the existence of a local custom to buy such material upon credit. *People ex rel Bowles vs. Burrell*, 14 Misc. 217.

8. Have power to enter upon the lands of any person adjoining any of the rivers, streams or creeks of the state, drive spiles, throw up embankments and perform such other labor as may be necessary upon the banks of such rivers, streams or creeks for the purpose of keeping them or any of them within their proper channels and preventing their encroachment upon any of the highways of the state; to enter upon any lands adjoining any highway and which lands during the spring fresh-

ets or any time of high water are subject to overflow from such rivers, streams or creeks, and to remove or change the position of any fence or other obstruction which prevents the free flow of water under or through any highway, bridge or culvert whenever the same may be necessary for the protection of any highway; to protect such highways and the property of the town from damages by reason of such rivers, streams or creeks washing away their embankments, or changing the location of the channels; to enter upon any lands adjacent to any of the highways of the town and with the approval of the town board to remove any fence or other obstruction which causes snow to drift in and upon said highway, and erect snow fences or other devices upon such lands to prevent the drifting of snow in or upon any such highway; and to agree with the owner of any such lands upon the amount of damages, if any, sustained by him in consequence of such entry upon his lands and the performance of the work herein authorized, and the amount of the damages so agreed upon shall be a town charge, and shall be audited and paid in the same manner as other town charges. If the commissioners are unable to agree with such owner upon the amount of damages thus sustained, the amount thereof shall be ascertained and determined and paid in the same manner as damages for the laying out and opening of highways are required by law to be ascertained, determined and paid, where the commissioners and land owner are unable to agree upon the amount thereof. (Added by L. 1891, chap. 212, and amended by L. 1899, chap. 344 and L. 1904, chap. 478.)

This subdivision is for the purpose of enabling a commissioner of highways to enter upon lands adjoining highways and perform labor by the erection of embankments or the digging of trenches so as to prevent the encroachment of streams upon the highways, and to remove obstructions in such streams which prevent the free flow of water under or through any highway

bridge or culvert, and to do such other work as may be necessary in respect to rivers, streams or creeks to prevent injury to the highways. The last sentence provides for ascertaining the damages sustained by the owners of such lands where the commissioner is unable to agree with such owners. The proceedings therefor are to be conducted in the manner prescribed by article 4 of the Highway Law, post.

9. Require overseers of highways to inspect the highways and bridges in their respective districts before May first, and, within five days thereafter, to report in writing to the commissioners such repairs as they deem necessary. Within twenty days after the receipt of such reports, the commissioners of highways shall personally inspect such highways and bridges in the town as are reported to be in need of repairs and shall, so far as practicable, personally superintend the repair thereof.
(Added by L. 1901, chap. 129.)

Inspection of overseers; reports.—It is made the duty generally of the overseer to repair and keep in order the highways within his district. Highway Law, § 20, sub. 1, post. This general duty would include the duty of inspecting the highways in his district, and by the above subdivision the commissioner may require him to inspect as to the highways, and also as to the bridges. The overseer may be required to report the condition of such highways and bridges as ascertained by such inspection. The report of the overseer may be in the following form:

FORM NO. 18.

Report of Overseer as to Condition of Highways and Bridges.

To L. M., Commissioner of Highways of the town of

The undersigned, overseer of highways of district No. 1, of the town of, has, pursuant to your request, inspected the highways and bridges in his district, and completed such inspection prior to May 1, 19.... I hereby respectfully submit to you the following report of the condition of the highways and bridges in my district at the time of such inspection.

(Here state definitely and in detail the condition of the several highways and bridges within the district as ascertained by inspection.)

Dated this day of May, 19... .

Signed J. K.,
Overseer of Highways, District No. .

§ 5. **Mile-stones and guide-boards.**—Commissioners of highways may cause mile-boards or stones to be erected upon the highways in their town as they think proper; they shall also cause guide-posts, with proper inscriptions and devices, to be erected at the intersectings of such highways therein, as they may deem necessary, which shall be kept in repair at the expense of the town, by the overseers of the highways of the districts in which they are respectively located. Upon the written application of five resident taxpayers of any town or twenty resident taxpayers of the county in which any such town is located to the commissioners of highways, requesting the erection of one or more guide-boards at the intersection of highways in such town, the commissioner of highways shall cause to be erected at the intersections mentioned in such application such guide-boards, indicating the direction, distances and names of the towns, villages or cities to or through which such intersecting highways run. Such application shall designate the highway intersections at which such guide-boards are requested to be erected and may contain suggestions as to the inscriptions and devices to be placed upon such boards. The cost of the erection and maintenance of such boards shall be a town charge. If the commissioner of highways refuses or neglects for a period of sixty days after receiving such application to comply with the request contained in such application, he shall for such neglect or refusal forfeit to the town the sum of twenty-five dollars to be recovered by the supervisor in the name of the town, and the amount so recovered shall be set apart for the erection of such guide-boards. (Amended by L. 1895, chap. 330.)

Object and purposes.—The above section authorizes the commissioners of highways to cause mile-boards or stones, and guide posts to be erected at such highway intersections as they may deem necessary. It also makes it obligatory upon

the commissioner to erect guide boards at certain highway intersections when application is made by the number of resident taxpayers of the town or county as specified. The expense of the erection and repair of such mile stones, and guide boards is a town charge, and should be audited by the town board and paid in the same manner as other town charges. As to audit of town accounts by town board, see Town Law, §§ 162, 167.

Injuries to mile-stones and guide-posts.—A person who willfully or maliciously displaces, removes, injures, or destroys a mile board, mile stone, or guide post, erected upon a highway or any inscription upon the same is punishable by imprisonment for not more than two years. Penal Code, § 639, sub. 6. Whoever shall injure, deface or destroy any mile stone or guide post, erected on any highway, shall, for every such offence, forfeit treble damages, Highway Law, § 153, post. A person injuring a mile stone or guide post may therefor be proceeded against criminally under the Penal Code or civilly under the Highway Law.

Erection of mile-stones and guide-posts by turnpike and plank road companies, see Transportation Corporations Law, § 136, post.

Application for erection of guide-boards.—A written application may be made to the commissioner of highways by five resident taxpayers of the town, or twenty resident taxpayers of the county requesting the erection of one or more guide boards at highway intersection. Such application may be in the following form:

FORM NO. 14.

Application for Erection of Guide-Boards.

To Commissioner of Highways of the town of

The undersigned, resident taxpayers of the town of (or resident taxpayers of the county of), pursuant to § 6 of the Highway Law, do hereby request that you erect guide boards at the intersection of the following highways in the town of (Here describe highways). That such guide boards indicate the direction, distances and names of the towns, villages or cities to or through which such intersecting highways run. We respectfully suggest that the following inscriptions and devices be placed upon such guide boards: (Here distinctly state the inscriptions desired to be placed upon each guide board at the specified highway intersections).

(Signed by resident taxpayers of the town or county.)

Dated, this day of 19.....

§ 6. Road machines and implements.—Commissioners of highways may, upon the request of one or more overseers of

the highway districts of their town, contract for and purchase for such district or districts, upon credit or otherwise, good and sufficient scraper and plow, or either of them, and if a majority of the taxpayers of one or more highway districts in any town, representing more than one-half of the taxable property in such district or in each of such districts, to be ascertained by the last preceding assessment roll and certified to as such by the town clerk of the town, petition the commissioner or commissioners of highways of such town therefor, such commissioners may together with the supervisor and overseer or overseers of such district or districts, contract for and purchase upon credit or otherwise, a road machine for the use of such district or districts, which implements shall be used, cared for and owned by such district or districts jointly. Such implements shall be paid for out of the highway tax of the district or districts for which they are purchased, and may be paid for in annual installments, not exceeding five. If purchased for more than one district the amount paid by each shall be in proportion to the amount of highway tax; a copy of the note or contract issued upon the purchase of such implements, shall be filed in the office of the town clerk of the town in which such town or road district is situated, and it shall be the duty of said town clerk to present a statement of the sum due thereon to the town board at each annual meeting thereafter for the audit of town charges, and the town board shall audit such sum and certify the same to the board of supervisors of the county. Not more than one-half of the highway tax of any district shall be applied in payment therefor, in any one year. The portion of such tax so applied, shall be required to be paid in money, and be assessed and levied upon the property of such district or districts, and collected in the same manner as other town charges are assessed, levied and collected, except that the amount thereof shall be put in a separate column upon the tax

roll, and the board of supervisors of the county shall cause the sum certified by the town board, to be levied upon the taxable property of such highway district. Such commissioner of highways shall with the assistance of the overseers of highways, in any road district which is to be charged with the payment for such machine after the completion of the assessment roll, and ten days before the meeting of the board of supervisors of the county, make and deliver to the supervisor of such town a list of the persons in such district or districts who are named in the last assessment roll of the town and chargeable with the payment of a tax for such machine. The commissioner or commissioners of highways may, also, with the approval of the town board, purchase and hold for the use of the town at large one or more road machines, and pay for the same with money appropriated and set apart for highway purposes. It shall be the duty of the commissioner or commissioners of highways of each town to keep the road machines belonging to such town, or any road district or districts in such town in repair, if such repairs are reasonable, and pay the expenses thereof out of the general highway funds of the town, and also to provide a suitable place for housing and storage of all tools, implements and machinery that are owned by the town or by the several highway districts, and cause these tools and implements and machinery to be stored therein when not in use. When such repairs upon any road machine belonging to any road district or districts shall exceed the sum of eight dollars in any one year, such expense shall be assessed and levied upon the property of such districts in the same manner as above provided for the collection of the purchase money of said machines, and when collected shall be paid to the commissioner or commissioners of highways of said town. Whenever any town shall change from the labor to the money system of working and repairing

the highways, as provided in sections fifty and fifty-one of the highway law, all road machines owned within such town, whether by the town or by any road district or districts therein, shall be used by the highway commissioner or commissioners of such town in such manner and at such places in such town as the commissioner or commissioners of highways of such town shall deem best. The said machines shall be kept in repair by the commissioners or commissioner at the expense of such town. (Amended by L. 1895, chap. 586, L. 1896, chap. 987, L. 1898, chap. 155, and L. 1904, chap. 153.)

Contracts for the purchase of road machines and scrapers should be made by the commissioners of highways in the name of the town, and when such contracts are otherwise lawfully made, they shall be deemed the contracts of the town, notwithstanding it is omitted to be stated therein that they are in the name of the town. Town Law, § 182. In towns which have adopted the money system, contracts for the purchase of road machines must be filed in the office of the town clerk within ten days after such contracts are made. L. 1895, chap. 717, post.

Writ of mandamus to compel commissioner and overseers to perform duty.—Where a road machine is purchased under the provisions of the above section the vendor of the machine is entitled to a peremptory writ of mandamus requiring the commissioner of highways and the overseers of highways to make and deliver to the supervisor of the town, ten days before the meeting of the board of supervisors "a list of the persons in such district or districts who are named in the last assessment roll of the town, chargeable with the payment of a tax for such machine." On an application for such writ the defendants cannot raise the question whether the taxpayers upon whose petition the machine was purchased constituted a majority of the taxpayers of the district representing more than one-half of the taxable property therein, where such fact was recited in the petition and is certified to by the town clerk, as required by the statute. *People ex rel Climax Co. v. Commissioner of Highways*, 48 App. Div. 550.

§ 7. Stone crushers and material.—The town board and commissioner or commissioners of highways of any town may,

when authorized by a majority vote of the electors voting theron, by ballot, at the annual or at a special town meeting, purchase a machine for crushing stone, a suitable roller, and such other machinery as may be necessary to be used, under the direction of the commissioner or commissioners of highways of said town, for the improvement of the highways thereof, and the commissioners of highways of any such town may, in any year, when authorized by a majority vote of the electors voting thereon, by ballot, at the annual or at a special town meeting, expend in said year a sum not exceeding two thousand dollars, for the purpose of purchasing stone, and quarrying, breaking, crushing and placing the same on the highways, in such road district or districts as the town board may direct and defraying the expenses of operating such machine, and shall present the account and vouchers for said purchases and expenses to the town board for audit, and the amount audited, together with the cost of such stone-crushing machine, when not before included, shall be levied and collected as other town audits. (Amended by L. 1895, chap. 411 and L. 1902, chap. 129.)

Submission of Proposition.—An application for the submission of a proposition under this section should be filed in the office of the town clerk as provided in section 32 of the Town Law. Such application must be in writing and should plainly state the proposition to be voted upon. The town clerk is required by such section to give at least ten days notice of the submission of such proposition by posting it conspicuously in at least four of the most public places in the town. If it is desirable to submit such a proposition at a special town meeting application for such a town meeting must be made in writing by at least twenty-five of the taxpayers of the town, addressed to the town clerk. (Town Law, § 23.) Upon the filing of such application the town clerk is required to give at least ten days notice of the holding of such special town meeting. Town Law, § 24.

Purchase of crushed stone in certain towns.—The commissioners of highways and the town board of any town of one thousand or less inhabitants adjoining a city having not less than thirty-five thousand inhabitants are authorized to expend a sum not exceeding \$20,000 in addition to the sum authorized to be expended by the above section. L. 1895, chap. 499, § 1, post page.

Acquisition of gravel beds.—The overseers of highways of any road district of the state, with the consent of the commissioners of highways of the town, and the approval of the town board, shall have power to purchase of the owner of any gravel bed or pit within the town, gravel for the purpose of grading, repairing or otherwise improving the highways of the town at a price per cubic yard approved by said commissioners and town board. If such overseer can not agree with any such owner for the purchase of such gravel, the overseer, with the consent of such commissioners and the approval of such town board, shall have power to acquire by condemnation the right to take and use such gravel, provided, no gravel shall be so condemned within one thousand feet of any house or barn, or taken from any lawn, orchard or vineyard, and to remove the same from such bed or pit for the purpose of grading, repairing or otherwise improving such highways, together with the right of way to and from such bed or pit to be used for the purpose of such removal. The right to use such gravel or to take the same from any such bed or pit may be acquired under this section for two or more or all of the road districts of the town, in common; and if acquired for two or more or all of the districts, the commissioners of highways, with the approval of the town board, must make the purchase or acquire such right by condemnation. The amount agreed to be paid upon any such purchase, and the amount adjudged to be paid upon any such condemnation shall be paid by the districts in which such gravel shall be used, but the costs and expenses of the proceedings for the condemnation incurred by the overseer, shall be a charge upon the town, and shall be audited by the town board, and paid the same as other town charges.

If the town shall abandon for the period of three years any right so acquired to use any gravel bed or pit or to take gravel therefrom, or if the overseer of highways of any such district wherein any such right shall have been so acquired, or the commissioners of highways of the town shall cease to use the same for the purposes for which it was acquired, the right of the town and of such overseer and commissioners thereto shall

cease, and the ownership thereof shall revert to and become vested in the owner of such bed or pit at the time such right was acquired, or his heirs or assigns. (L. 1891, chap. 309, §§ 1, 2.)

§ 8. Custody of stone-crushers.—Such machine, when purchased, shall be under the care and custody of the commissioners of highways of the town; and where there is an incorporated village constituting a separate highway district, in any town, they may, by an agreement with the trustees of the village, permit an equitable use of the machine to such separate village district.

§ 9. Additional tax.—Whenever the commissioners of highways shall determine that the sum of five hundred dollars will be insufficient to pay the expenses actually necessary for the improvement of highways and bridges, the removal of obstructions caused by snow and the prevention of such obstructions, they may cause a vote to be taken by ballot at any town meeting, authorizing such additional sum to be raised as they may deem necessary for such purpose, not exceeding one-third of one per centum upon the taxable property of the town as shown by the last assessment roll thereof. (Amended by L. 1904, chap. 478.)

Submission of proposition for the raising of money.—The above section authorizes the commissioners of highways of a town to secure an appropriation by a town meeting of such sums in excess of \$500 as may be required for the improvement of highways and bridges. The Town Law, § 31, provides that all votes upon any proposition to raise or appropriate money or incur any town liability exceeding \$500 shall be by ballot. Special town meetings may be called upon the application of commissioners of highways to determine questions pertaining to their respective duties, and which the electors of a town have a right to determine. Such application should be in writing, signed by the commissioners, and addressed to the town clerk. Town Law, § 23. Upon an application being

thus made by the commissioners the town clerk is required to give at least ten days' notice specifying the time, place and purposes of the meeting; such notice must be posted conspicuously in at least four of the most public places in the town. Town Law, § 24. The commissioners must file with the town clerk a written application plainly stating the question they desire to have voted upon and requesting a vote thereon at the town meeting specified therein. They must also file with such application a statement of their accounts to date, with the facts and circumstances which in their opinion make the appropriation necessary, and also an estimate of the sum necessary for the purposes stated. Town Law, § 32.

Effect of section.—The above section has for its purpose the appropriating of town money by a regular or a special town meeting without the issue of town bonds therefor. The commissioners are thus enabled to secure a specific amount to be used by them for the making of necessary highway improvements without application to the town board, or without the issuing of town bonds for the purpose of raising such money. If it is desired to appropriate a less amount than \$500 the vote thereupon may be *viva voce*. Town Law, § 31. But on all appropriations of more than \$500 the vote must be by ballot.

If it is proposed to raise money by the issue of town bonds for the construction and improvement of highways and bridges authority must be procured from the board of supervisors. County Law, §§ 12 (sub. 6) 13, 14, 69.

§ 10. Extraordinary repairs of highways or bridges.—If any highway or bridge shall at any time be damaged or destroyed by the elements or otherwise or become unsafe, the commissioner of highways of the town in which such highway or bridge may be, may cause the same to be immediately repaired or rebuilt if consented to by the town board, but if the expense thereof exceed five hundred dollars, it shall be done under a written contract therefor which must be approved by the town board, and the commissioners of highways shall present the proper vouchers for the expense thereof to the town board, at their next annual meeting, and the same shall be audited by item and collected in the same manner as amounts voted at

town meetings. (Amended by L. 1895, chap. 606, and L. 1899, chap. 84.)

Ordinary repairs.—The amount to be raised in each town for the repair and maintenance of highways, in addition to the highway labor, or the commutations therefor, unless the money system is adopted, is estimated for annually by the commissioner, and shall not exceed the annual sum of \$500. See Highway Law, § 19, post. The amount raised by tax in towns adopting the money system is not less than one dollar on each five hundred dollars of assessed valuation of the real and personal property in a town, and shall equal at least one-half the value at the commutation rates of the highway labor which should be assessable under the labor system. Highway Law, § 53, post. Under such section there is also added to this amount the amount received from the state because of the adoption of the money system. The total amount available for the ordinary repair and maintenance of highways and bridges in towns where the labor system is in existence, is estimated for by the commissioners and levied upon the town by the board of supervisors, and in no case exceeds the sum of \$500. If an additional amount is required in such towns for such ordinary repairs and maintenance, a vote must be taken upon a proposition duly submitted at a biennial or special town meeting under the authority of § 9 of the Highway Law. In towns which have adopted the money system the amount available in the hands of the highway commissioner for ordinary repairs and maintenance of highways and bridges is the amount raised by tax not less than one dollar on each five hundred dollars of assessed valuation, and equaling at least one-half the value at the commutation rates of the highway labor which should be assessable under the labor system, and the amount received from the state equaling fifty per centum of the amount levied in each town.

Extraordinary repairs.—Under the above section where any highway or bridge is damaged or destroyed by the elements or otherwise, or becomes unsafe, the commissioners of highways may cause the same to be immediately repaired, notwithstanding the extent of such damages and the cost of the repairs, by securing the consent of the town board as provided therein. Except as provided in such section the commissioners of highways cannot bind the town by their contracts. *People ex rel Everett v. Supervisors*, 93 N. Y. 397; *Berlin Bridge Co. v. Wagner*, 57 Hun 346, 10 N. Y. Supp. 840. In the case of

Lythe v. Town of Evans, 33 Misc. 221, 227, the court said: "If extraordinary repairs become necessary, and the funds supplied are insufficient for the purpose, the law provides the method of procedure to be taken by the commissioners with the consent of the town board, whereby a legal obligation to pay for the necessary expenditure may be created directly against the town itself." In no other way may the commissioners create an obligation or liability against the town, and in the case of *People ex rel Bowles v. Burrell*, 14 Misc. 214, it was held that highway commissioners have no power to pledge the credit of the town for materials for the repair of highways, and the person furnishing such material has no claim therefor upon the town, notwithstanding the existence of a local custom to buy such material upon credit.

Where the appropriation for the improvement of highways and bridges of a town, made under section 19 of the Highway Law, is insufficient, the proper course of the commissioner of highways is to apply, under sections 10 and 11 of the Highway Law, to the town board for consent to make the necessary improvements. In the absence of such consent the commissioner of highways has no power to proceed with the improvements and apply in payment therefor the appropriation for the succeeding year; and expenditures so made create no legal claim against the town. *People ex rel Peterson v. Clark*, 45 App. Div. 65.

Consent of town board.—The consent of the town board is a prerequisite to the reconstruction or repair of a highway or bridge damaged or destroyed by the elements. Without such consent the commissioner of highways has no authority whatever to contract for the town or incur indebtedness for such a purpose. With it, he may contract for the rebuilding of a bridge and the contract is to be deemed the contract of the town and should be made in the name of the town. When a town board has once given its consent to the reconstruction of a bridge its duties pertaining thereto are at an end. It cannot direct the commissioner as to what kind of a bridge shall be erected or as to how or by whom it shall be built. *People ex rel Groton Bridge Co. v. Town Board*, 92 Hun 585; *Town of Saranac v. Groton Bridge Co.*, 55 App. Div. 134.

A consent of a town board that "the commissioner of highways of the town of Greece is hereby authorized to repair the bridges that may have gone down since the annual town meeting to the best of his judgment" was held sufficient to authorize the commissioner to remodel or reconstruct a bridge if in

his judgment it was deemed best or necessary so to do. *People ex rel Slater v. Smith*, 83 Hun 432; *Hall v. Town of Oyster Bay*, 61 App. Div. 508.

But where a town board passes a resolution allowing the commissioner of highways to rebuild a bridge destroyed by a flood, provided he can do so by subscription for the necessary labor, and after subscriptions amounting to 180 days' labor had been obtained, the town board passes the following resolution:—"Resolved that we, as a town board, hereby consent that the commissioner of highways build the bridge known as the Wilcox bridge at Redford, provided that the same contributions can be secured as has heretofore been offered," the highway commissioner has no power to enter into a contract for the construction of an iron bridge for the contract price of \$4,000, to be paid in cash or town certificates, providing that "the subscription of labor, subscribed heretofore, will be used in hauling and erecting the work." *Town of Saranac v. Groton Bridge Co.*, 55 App. Div. 134.

The statute does not prescribe or require any particular form of consent by the town board to the rebuilding of a bridge. It was the evident purpose of the statute that a commissioner of highways should not be permitted to create obligations against the town for the rebuilding or repairing of bridges upon the theory that they were unsafe until the town board should have passed upon that question and determined in favor of the repairs or rebuilding. *Basselin v. Pate*, 30 Misc. 368. In this case it was held that where the board formally resolves that an unsafe bridge should be replaced by a new one, the commissioner has authority to contract for the bridge, although the board subsequently attempted to delay action in order that it might procure legal advice in the matter.

The town board cannot by its resolution direct the commissioner as to the course he should pursue in constructing a bridge. As in the case of *People ex rel Groton Bridge Co. v. Town Board*, 92 Hun, 585, wherein a direction in a resolution of a town board that the commissioner should employ an engineer to receive proposals from responsible contractors for the superstructure and substructure, and let the same to the lowest bidder, was held to be surplusage, for the reason, as stated by the court, that the "manner of constructing the bridge was entirely within the jurisdiction of the highway commissioner. Whether he would build it by contract or employ his own men, or whether he would invite competitive bids, and whether he would let the contract to the lowest or highest

bidder were questions for his decision." Since this case was decided the above section has been amended so that now if the amount to be expended exceeds five hundred dollars, the work shall be done "under a written contract therefor, which must be approved by the town board."

The consent of the town board and the town clerk's certificate to transcripts may be in the following form:

FORM NO. 15.

Consent of Town Board.

COUNTY OF..... } ss.
Town of..... }

At a special meeting of the town board of the town of called by the supervisor (or town clerk) thereof, held this day of 19.... the following preamble and resolution was adopted:

Whereas, The highway (or bridge) known as (here describe it) was destroyed by (describe how) on 19.... (or has become damaged), and there not being sufficient moneys in the hands of the commissioners of highways to rebuild (or repair) the same; therefore, be it

Resolved, That we do hereby consent that the commissioners of highways of the town of cause said highway (or bridge) to be immediately rebuilt (or repaired) according to law.

Dated this day of 19....

(Town board sign here.)

Town Clerk's Certificate to Transcript.

Office of Town Clerk. } ss.
TOWN OF..... }

I do hereby certify that I have compared the above transcript of the proceedings of the town board of said town, at a special meeting held on the day of 19.... with the original record thereof in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Dated this day of 19....

O. P.,
Town Clerk.

§ 11. Auditing expense thereof.—The town board may be convened in special sessions by the supervisor, or in his absence by the town clerk, upon the written request of any commissioners of highways, and the bills and expenses incurred in the erection or repairs of any such highways or bridges, may then be presented to, and audited by the town board; and the supervisor and town clerk shall issue a certificate, to be subscribed by them, setting forth the amount so audited and allowed, and in favor, and the nature of the work done and material used, and such certificate shall bear interest from its date,

and the amount thereof, with interest, shall be levied and collected in the same manner as other town expenses.

Duty of town board to audit.—Where a town board has regularly consented to the making of extraordinary repairs or the reconstruction of bridges and highways, it cannot thereafter refuse to audit the bills incurred by the commissioner on account of such repairs or reconstruction; and where a resolution granting such a consent has been passed, the board cannot rescind said resolution after the commissioner has acted thereunder and let a contract for the performance of the work, and refuse to audit the claims arising under such contract. *Baselin v. Pate*, 30 Misc. 368.

The board cannot, after authorizing the construction of a bridge, and after it has been constructed, insist that the bridge was unnecessary, and refuse to audit the claim therefor. And where the board refused to audit such a claim in full, the appellate court has power to amend, upon the hearing had upon the return to a writ of certiorari, the determination made by the town board, and to allow the claim of the contractor for the work at the sum which the commissioner of the town agreed to pay him. *People ex rel Groton Bridge Co. v. Town Board*, 92 Hun, 585.

If a town board has consented that the commissioner of highways shall construct a bridge, it becomes its duty to audit his bill on the merits when it is duly presented to the board for that purpose. The question whether the consent expressed in a prior resolution of the board is broad enough to authorize the commissioner of highways to proceed in the manner he did, in building the bridge, is one of construction; its interpretation or effect is not necessarily a matter to be controlled by the judgment of the board to which the claim is presented, and so far as there are any facts legitimately bearing upon that question, they are properly the subject of consideration upon the trial of the issues made by the return to an alternative writ of mandamus. *People ex rel. Slater v. Smith*, 83 Hun, 432.

Meeting of town board.—The regular meeting for the audit of town accounts is held on the Thursday preceding the annual meeting of the board of supervisors. It is at this meeting that claims arising from the extraordinary repairs or reconstruction of highways and bridges, authorized by the town board as provided in section 10 of the Highway Law should be presented for audit, unless the commissioner of highways request a special meeting for such purpose.

The following form of request for a special meeting of the town board may be used:—

FORM NO. 16.

Request for Special Session of Town Board.

To the Supervisor (or Town Clerk) of the Town of in the County of:

The undersigned, commissioners of highways of the town of do hereby request that the town board be convened in special session, for the purpose of auditing the bills and expenses incurred in the erection (or repair) of the highway (or bridge) under consent given by said board on the day of 19.....

Dated this day of 19.....

A. B.,
C. D.,
E. F.,

Commissioners of Highways

The following is a form of the certificate of the audits of claims on account of extraordinary repairs of highways and bridges as provided in the above section:—

FORM NO. 17.

Certificate of Supervisor and Town Clerk.

Town of } ss.:
COUNTY OF }

The undersigned, supervisor and town clerk of the town of do hereby certify that at a special session of the town board this day held, for the purpose of auditing and allowing the bills and expenses incurred by the commissioners of highways of said town, under the consent given by said town board, the day of 19..... the following bills and accounts were audited and allowed, with interest:

DATE.	IN WHOSE FAVOR.	Nature of Work Done and Material Furnished.	Amount Allowed.

Dated this day of 19.....

R. S.,
Supervisor.
O. P.,
Town Clerk.

§ 11a. Damages for change of grade.—In any town in which a highway hereafter shall be repaired, graded and macadamized from curb to curb by the authorities of the town in ac-

cordance with the provisions of section sixty-nine of chapter six hundred and eighty-six of the laws of eighteen hundred and ninety-two, the owner or owners of the land adjacent to the said highway shall be entitled to recover from the town the damages resulting from any change of grade. A person claiming damages from such change of grade, effected since May fifteenth nineteen hundred and three and prior to the passage of this act, must present to the town board of such town a verified claim therefor within ninety days after this act takes effect. A person claiming damages from such change of grade hereafter effected must present to the town board of such town a verified claim therefor within sixty days after such change of grade is effected. The board may agree with such owner upon the amount of damages to be allowed him. If no agreement be made within thirty days after the presentation of the claim, the person presenting it may apply to the supreme court for the appointment of three commissioners to determine the compensation to which he is entitled. Notice of the application must be served upon the supervisor of the town at least ten days before the hearing thereof. All proceedings subsequent to the appointment of commissioners shall be taken in accordance with the provisions of the condemnation law so far as applicable. Such town board, or such commissioners, shall, in determining the compensation, consider the fair value of the work done, or necessary to be done, in order to place the claimants' lands, or buildings, or both, in the same relation to the changed grade as they stood to the former grade, and make awards accordingly, except that said board or said commissioners may make an allowance for benefits derived by the claimant from such improvement. The amount agreed upon for such damages, or the award therefor together with the costs, if any, allowed to the claimant, shall be a charge against such town and the supervisor shall pay the same, if there be sufficient

funds in his hands available, and if not, the town board shall borrow money for the payment thereof, or issue certificates of indebtedness therefor. This act shall not affect any pending proceeding or action. (Inserted by L. 1903, chap. 610, and amended by L. 1904, chap. 443, in effect September 1, 1904.)

§ 12. Accounts, how made out.—No account for services rendered, or material furnished according to the provisions of this chapter, shall be allowed by such board unless the same shall be verified in the same manner as town accounts are required by law to be verified, nor unless the commissioners of highways shall certify that the service has been actually performed, and the material was actually furnished, and that the same was so performed or furnished by the request of such commissioners; and the town board may require and take such other proof as they may deem proper, to establish any claim for such labor and material, and the value thereof.

Verification of town accounts must be in the form prescribed by § 167 of the Town Law. Such section reads as follows:

“No account shall be audited by any board of town auditors or supervisors or superintendent of the poor for any services or disbursements unless such account shall be made out in items and accompanied with an affidavit attached thereto, and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct and that the disbursements and services charged therein have been in fact made or rendered or are necessary to be made or rendered at that session of the board, and stating that no part thereof has been paid or satisfied; and the chairman of the board or either of the superintendents may administer any oath required under this section.”

And it is also provided in § 168 of the Town Law that:

“Nothing in the preceding section shall be construed to prevent any board from disallowing any account, in whole or in part, when so rendered and verified, nor from requiring any other or further evidence of the truth and propriety thereof, which board may think proper.”

Settive accounts.—A town board may properly refuse to a bill or account that is in improper form; but the fact

that a claimant has presented an informal and defective bill to the board for audit is not a reason for absolutely rejecting his claim and thus depriving the claimant of that which may be fairly and honestly due him. The claimant should be permitted to amend his bill for the purpose of curing the defects. *People ex rel Mason v. Board of Supervisors*, 45 Hun. 62. Where a proper claim has been disallowed because not presented in proper form, or not properly verified or accompanied by proper vouchers, or for any other reason not involving a determination on the merits, it may be presented to, and audited by a subsequent board. *Osterhoudt v. Rigney*, 98 N. Y. 222; so where a bill which has been presented to a town board, so informal or defective in form as to justify its rejection for that reason, the claimant should be permitted to represent his bill in such form as to obtain its adjudication upon its merits. *People ex rel Andrews v. Town Auditors*, 33 App. Div. 277.

The account, verification and certificate required by the above section may be in the following form:—

FORM NO. 18.

Account, Verification and Certificate.

The Town of	To L. M., Dr.	
January, 19..., to	(days' labor on)	\$
January, 19..., to	(feet of plank)	

Total	\$
-------------	----------

(Signed) L. M.

State of New York.
County of
Town of } ss.

L. M., being duly sworn, deposes and says that he is the claimant mentioned in the foregoing account against the town of; that the items of such account are correct and that the disbursements and services (or articles specified, as the case may be) charged therein have been in fact made or rendered (or furnished as the case may be), and that no part thereof has been paid or satisfied.

L. M.

Subscribed and sworn to before me,
this day of, 19....

J. N.

Justice of the Peace for the Town of

STATE OF NEW YORK.
COUNTY OF
Town of } ss.

The undersigned, commissioners of highways of said town, do hereby certify that in the foregoing account of L. M., the services mentioned were actually performed, and the material mentioned was actually

furnished, and the same was so performed and furnished at our request.

Dated this day of, 19.....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 13. Unsafe toll-bridge.—Whenever complaint in writing, on oath, shall be made to the commissioners of highways of any town in which shall be, in whole or in part, any toll-bridge belonging to any person or corporation, representing that such toll-bridge has from any cause become, and is unsafe for the public use, such commissioners of highways shall forthwith make a careful and thorough examination of such toll-bridge, and if upon the examination thereof, they shall be of the opinion that the same has from any cause become dangerous or unsafe for public use, they shall thereupon give immediate notice to the owners of such toll-bridge, or to any agent of such owners, acting as such agent, in respect to such bridge, that they have on complaint made, carefully and thoroughly examined the bridge, and found it to be unsafe for the public use. Such owners shall thereupon immediately commence repairing the same, and cause such repairs to be made within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair the bridge, so as to make it in all respects, safe and convenient for public use; and for neglect to take prompt and effective measures so to repair the bridge, its owners shall forfeit twenty-five dollars; and shall not demand or receive any toll for using the bridge, until the same shall be fully repaired; and the commissioners of highways shall cause such repairs to be made, and the owners of the bridge shall be liable for the expense thereof, and for the services of the commissioners at two dollars per day; and upon the neglect or refusal to pay the same upon presentation of an account thereof, the commissioners of highways may recover the same by action, in the name of the town.

As to rights, duties and liabilities of turnpike, plank road, and toll-bridge corporations, see Transportation Corporations Law, §§ 122-150, post p.

Complaint that a toll-bridge is unsafe for the public use may be in form following:—

FORM NO. 19.

Complaint that Toll-Bridge is Unsafe.

COUNTY OF }
Town of } ss:

L. M., being duly sworn, complains on oath to the commissioners of highways of the town of , in the county of , that he believes the toll-bridge belonging to , situated on the (give name of stream), at (describe place), has become and is unsafe for public use and travel; and that the reasons for his belief are as follows (set forth reasons).

L. (M.)

Subscribed and sworn to before me,
this day of , 19....

G. H.,
Justice of the Peace.

Notice to owners of toll-bridge as to unsafe condition thereof may be in the following form:—

FORM NO. 20.

Notice to Owners of Toll-Bridge.

To (owners or agent of the owners, as the case may be).

You are hereby notified that the commissioners of highways of the town of , in the county of have, on complaint made, carefully and thoroughly examined the toll-bridge situated on the , at (describe the situation), and found it to be unsafe for public use and travel. (State briefly wherein it is unsafe.)

Dated this day of , 19....

A. B.,
C. D.,
E. F.,

Commissioners of Highways.

§ 14. Drainage, sewer and water pipes in highways.—The commissioners of highways may upon written application of any resident of their town, grant permission to lay and maintain drainage, sewer and water pipes and hydrants under ground, within the portion therein described, of any highway within the town, but not under the traveled part of the highway, except across the same, for the purposes of sewerage, draining swamps or other lands and supplying premises with

water, upon condition that such pipes and hydrants shall be so laid as not to interrupt or interfere with public travel upon the highway. The consent of the commissioner shall be executed in duplicate, signed by him and indorsed with the written approval of the supervisor and the acceptance of the applicant, and one of such duplicates shall be delivered to the applicant and the other filed with the town clerk. The consent shall also contain a provision to the effect that it is granted on the condition that the applicant will replace all earth removed, and leave the highway in all respects in as good condition as before the laying of said pipes; that the applicant will keep such pipes and hydrants in repair and save the town harmless from all damages which may accrue by reason of their location in the highway; that upon notice by the commissioner, the applicant will make any repairs required for the protection or preservation of the highway; that upon his default such repairs may be made by the commissioner at the expense of the applicant, and that such expense shall be a lien prior to any other lien upon the land benefited by the use of the highway for such pipes or hydrants; and that the commissioner may also, upon the applicant's default, revoke the permission for the use of the highway, and remove therefrom such pipes or hydrants. (Amended by L. 1897, chap. 204.)

Use of highways by public corporations, see chap. V., post. A water works company organized pursuant to section 80 of the Transportation Corporations Law may, upon obtaining the permit of the town board authorizing the formation of such company for the purpose of supplying the town with water, lay and maintain its pipes and hydrants in the highways of the town in which such permit is secured. See Transportation Corporations Law, § 82. Pipe line corporations may construct pipe lines along public highways with the consent of the commissioners of highways of the town. See Transportation Corporations Law, § 45.

Gas and electric light corporations may, with the consent of the town board, lay gas pipes and electric conduits in the

streets and highways of the town. Transportation Corporations Law, § 61.

A contract between a water works company and a town for the furnishing of water for the use thereof, and of its inhabitants, which contained a provision that the company's pipes should be laid under the supervision of the commissioners of highways, their services to be paid for by the company, is not invalid because of the clause requiring payment of compensation of such commissioners by the company. Such a provision is questionable, however, and requires close scrutiny by the courts; the burden, in such a case, is upon the company to show that the contract is just and fair, and has been justly and fairly carried out. Slight evidence of improper or unfair execution of duty upon the part of the commissioners, or of a failure to perform the contract by the company would require a finding of a fraudulent motive for its insertion. *Nicoll v. Sands*, 131 N. Y. 19.

Application to lay water pipes in highways, and the consent of the commissioners may be in the following form:

FORM NO. 21.

Application to Lay Water Pipes in the Highway.

To the Commissioners of Highways in the Town of , in the County of

The undersigned, an inhabitant of the said town of , does hereby make application to you for permission to lay and maintain water pipes and hydrants (or drainage or sewer pipes) under ground, within the highways of said town, pursuant to section 14 of the highway law, as follows: (Here state where the pipes are proposed to be laid.)

Dated this day of , 19....

L. M.

FORM NO. 22.

Consent to Lay and Maintain Water-Pipes in Highway.

The undersigned, commissioners of highways of the town of , in the county of , on the written application of L. M., do hereby consent that the said L. M. lay and maintain water-pipes and hydrants (or drainage and sewer-pipes) under ground within the highways of said town as follows: (Here state where the pipes are to be laid.) Subject, however, to the following conditions:

That the said L. M. will replace all earth removed, and leave the highway in all respects in as good condition as before the laying of said pipes; that he will keep such pipes (and hydrants) in repair and save the town harmless from all damages which may accrue by reason of their location in the highway; that upon notice by the commissioners the applicant will make any repairs required for the protection and preservation of the highway; that upon his default, such repairs may be made by the commissioners at the expense of the said L. M., and that such expense shall be a lien prior to any other lien upon the land benefited by the use of the highway for such pipes or hydrants; and

the commissioners of highways of such town may, upon the default of the said L. M., his assigns or legal representatives, revoke this consent and remove therefrom such pipes or hydrants.

Dated this day of 19....

A. B.,
C. D.,
E. F.,

Commissioners of Highways.

I, the undersigned, supervisor of the said town of do hereby approve of the foregoing consent to L. M.

G. H.,
Supervisor.

I, the undersigned, applicant above mentioned, do hereby consent to conditions contained in the foregoing consent.

L. M.

§ 15. Actions for injuries to highways.—The commissioners of highways may bring an action, in the name of the town, against any person or corporation, to sustain the rights of the public in and to any highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway.

Actions brought by commissioners of highways or other town officers must be in the name of the town. See Town Law, § 182.

Injuries to highways.—Any person who shall injure any highway or bridge maintained at the public expense is liable to treble damages. Highway Law, § 153, post. Penalties or forfeitures prescribed by the Highway Law are to be recovered by the commissioners of highways in the name of the town, Highway Law, § 164, post.

Restoration of highway by railroad.—A railroad corporation which for the purposes of its railroad injures or interferes with a highway must restore such highway to its former state, or to such state as not to unnecessarily impair its usefulness. Railroad Law, § 11, post. The provisions of such section of the Railroad Law imposing upon a railroad company the duty to restore the highway "to its former state, or to such state as unnecessarily to impair its usefulness," does not relieve commissioners of highways from the care, and control of those

parts or the public highways constituting approaches to railroad crossings, although constructed by the railroad company in discharge of its statutory duty. The commissioners are authorized to institute proceedings to compel the company to fully perform this duty, or when it is in default, they may proceed and do the necessary work, and maintain an action against the company for the expense. *Bryant v. Town of Randolph*, 133 N. Y. 70. Where a railroad fails to comply with its statutory duty in this respect the remedy is provided by the above section, but such remedy is not exclusive and does not supersede common law remedies, and the railroad company may be proceeded against by mandamus, or by indictment for maintaining a nuisance. *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302; *People ex rel Green v D. & C. R. R. Co.*, 58 N. Y. 153.

The intention of the statute is to impose upon a railroad company, whose track is upon an original highway, the duty of maintaining the restored, as well as of restoring the original highway, at least so far as affected by its own operations, and so long as changes are made therein by the railroad, or occur in consequence of its operation, which affect the safety of the highway, the statutory duty to preserve the usefulness of the highway attaches and remains until fully complied with. *Allen v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 151 N. Y. 434.

While the commissioner cannot dictate how the work of restoring the highway should be accomplished by the railroad company, the duty imposed upon the company to restore is "a corporate duty" which the company is bound to perform, and for any failure in its performance, in addition to other remedies, the commissioner of highways is authorized by chapter 255 of the Act of 1855, (revised and now contained in the above section) to maintain an action to enforce the performance, or for damages sustained by the town from non-performance. *Post v. West Shore & Buffalo R. R. Co.*, 123 N. Y. 587.

The duty imposed to restore is a continuous one and cannot be barred by any statute of limitations. *Hatch v. Syracuse, B. & N. Y. R. R. Co.*, 24 N. Y. St. Rep. 36. The case of *Town of Windsor v. D. & H. C. Co.*, 92 Hun. 127, was an action commenced in June, 1892, in the name of the town by the commissioner of highways thereof, to enforce the rights of the public in a highway; it appeared that the highway in question had been laid out about the year 1814, and that the defendant, a railroad corporation, about the year 1871, had by the construction of an overhead crossing narrowed the highway so that

the free space was only of the width of thirteen feet and two inches, while the public use required the width of twenty-five feet. It was held that an action was maintainable under the above section to sustain the rights of the public in and to such highway, and to enforce the performance of the duty enjoined upon the railroad company in relation thereto, and that it was not necessary for the highway commissioner of the town to declare an encroachment, or to institute proceedings under the statute for the removal of the encroachment; it was also held that the existence of the obstruction for the period of upwards of twenty years did not limit the public to the use of the space left free, and that it was a question of fact whether the needs of the public were such that the space left was inadequate.

A town may, under the above section, maintain an action to restrain a traction company from tearing up and obstructing its highways without lawful authority, and compel the company to restore to its former condition a portion of the highway which had been torn up by it. *Town of Eastchester v. N. Y. W. & C. Traction Co.*, 30 Misc. 571.

Mandamus will lie at the instance of a private citizen in the name of the people to compel a railroad company to restore a highway: such proceeding is entirely independent of the remedy given by the above section for the removal of encroachments by an action brought by the commissioner of highways in the name of the town. *People ex rel Bacon v. Northern Central Ry. Co.*, 164 N. Y. 289.

Abatement of nuisance.—Where a mill owner digs a raceway through a highway and builds over it a bridge, he is primarily liable to repair the bridge, and where it becomes unsafe, it is a nuisance which the town may, upon the refusal of the owner, abate by itself repairing the bridge, and this expense may be recovered by the town from the owner of the mill, although it appears upon the trial that he had no actual notice that there was any obligation resting upon the owner of the property to keep the bridge in repair. *Town of Clay v. Hart*, 25 Misc. 110.

Abandonment of turnpike.—Where a turnpike corporation abandons its turnpike to become a public highway, and where previous to such abandonment a railroad corporation takes possession of the turnpike, an action may be maintained under the above section against such company to compel a surrender of all parts of the roadway to the commissioners of highways of the town. *Town of Palatine v. N. Y. C. & H. R. R. Co.*, 22 App. Div. 181.

An action may be brought against an electric light company under this section to compel the removal from streets and highways of poles, wires and electric lamps which constitute an unlawful obstruction in the highway, amounting to a public nuisance. *Village of Hempstead v. Ball Electric Co.*, 9 App. Div. 48.

Where commissioners for the drainage of marsh lands have without the consent of the town authorities cut a channel for the drainage of water across a town highway, and they omitted to construct a suitable bridge across such channel for the convenience of the public using such highway, an action is maintainable in the name of the town under the above section to compel the performance of such duty by the commissioners, in spite of the fact that the statute under which they act does not in terms confer upon them the power to construct such a bridge. *Town of Conewango v. Shaw*, 31 App. Div. 354.

§ 16. Liability of towns for defective highways.—Every town shall be liable for all damages to person or property, sustained by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town. No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action shall have been presented to the supervisor of the town, within six months after the cause of action accrued; and no such action shall be commenced until fifteen days after the service of such statement.

Prior to the Act of 1881, chapter 700 from which the above section is derived, there was no liability on the part of the town for the negligence of commissioners of highways. *Flynn v. Hurd*, 118 N. Y. 19; *Monk v. Town of New Utrecht*, 104 N. Y. 552; *People ex rel Loomis v. Board of Town Auditors*, 75 N. Y. 316; *McGuinness v. Town of Westchester*, 66 Hun 356; *Embler v. Town of Wallkill*, 57 Hun 384; *Frasier v. Town of Tompkins*, 30 Hun 168; *Fay v. Town of Lindley*, 11 N. Y. Supp. 355. Prior to such act whatever responsibility there was for injuries to person or property resulting from defects in the highways rested primarily upon the commissioners. Even at such time no absolute liability for such injuries was imposed by law upon them, but only a limited responsibility

arising out of their negligence in failing to apply the funds available in their hands to the making of necessary repairs. *Monk v. Town of New Utrecht*, 104 N. Y. 552; *Hines v. City of Lockport*, 50 N. Y. 236; *Hover v. Barkhoof*, 44 N. Y. 113. In the case of *Dorn v. Town of Oyster Bay*, 84 Hun 510, it was said: "Planting themselves upon the fact that the towns had no ownership or interest in the highways within their borders, that even their use did not pertain exclusively to the inhabitants of the towns, but only in common with the whole people, that the officers having the care of the highways were not the agents of the towns, and received no instructions from them, the courts in the earlier cases refused to entertain suits against the towns for the recovery of damages for accidents on the highways therein. As late as the year 1864 the right to maintain such actions was substantially denied in the Court of Appeals in the case of *Garlinghouse v. Jacobs*, 29 N. Y. 300, and it was said in that case that from the organization of the state government down to 1820 there was no known instance in this state of an attempt to enforce a civil remedy in respect to highways. Finally, in 1870, the Court of Appeals decided in the case of *Hover v. Barkhoof*, 44 N. Y. 113, in favor of the right to maintain such actions against commissioners of highways. After that time actions of that character were frequently sustained down to 1881, when the towns were made liable by statute, (L. 1881, chap. 700), for damages to persons and property sustained by reason of defects in highways and bridges, in cases where the commissioners of highways were then liable therefor. In 1890, (Highway Law, § 16), the towns were made absolutely liable for all damages to persons and property sustained by reason of defects in highways or bridges existing by reason of neglect of commissioners of highways of such towns."

The revision of 1890 as contained in the Highway Law changed the phraseology of the statute of 1881 by its re-enactment in the above section. The Act of 1881 imposed liability upon the town in cases in which commissioners of highways were by law liable at that time, and substituted a corporate liability of the town for the individual liability of the commissioners. The above section lays the responsibility upon the town for damages to persons and property sustained by reason of any defect in its highways and bridges existing because of the negligence of any commissioner of highways of such town. There was no important change in the effect of the Act of 1881 by the revision. Under that act as under the present the negligence of the commissioners of highways is the important

element in all cases arising thereunder. *McGuinness v. Town of Westchester*, 66 Hun 356.

Defect in highways.—The obligation of a town to maintain its highways free from all defects and imposing upon a town liability for a failure to perform such obligation are both entirely of statutory origin. *Morey v. Town of Newfane*, 8 Barb. 645; *People ex rel Loomis v. Board of Town Auditors*, 75 N. Y. 316; *Monk v. Town of New Utrecht*, 104 N. Y. 552, in which case it was held that a town was not at common law under any legal liability to respond in damages to persons injured by defects in the highways. The liability of towns in this respect is different from that imposed on cities and villages, upon the theory that a city or village has certain corporate functions, upon assuming which they undertake to perform certain obligations, among which are the maintenance of streets and highways in a passable condition, and the liability to respond in damages for injuries occasioned by defects therein. See *Conrad v. Village of Ithaca*, 16 N. Y. 158; *Albrecht v. County of Queens*, 84 Hun 399.

The above section of the Highway Law and the Act of 1881 from which it was derived have changed the common law rule and imposed upon the town a liability for defects in highways. In considering the question of the town's liability it must first be determined whether the injury was caused from what might legally be deemed a defect. The term "defective highways" is used in reference to their condition for public travel upon them, which their designation as highways imports, and in view of the purpose for which they are established and maintained. The impairment of a highway for public use may be no less such by an obstruction placed in it than by a physical disturbance or injury to the bed of the roadway. In either case the highway is in a defective condition, and evidently such condition is within the meaning of the term. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40.

A wooden awning over a sidewalk, (*Hume v. Mayor*, 74 N. Y. 273); an advertising banner suspended over a street, (*Champlain v. Village of Penn Yan*, 34 Hun 33, aff'd. 102 N. Y. 680); a pile of ashes in a street, (*Ring v. City of Cohoes*, 77 N. Y. 83); a pile of stones upon the side of a roadway, (*Eggerton v. Columbia Turnpike R. Co.*, 82 N. Y. 279) have all been held to be defects in streets or highways.

Erection of barriers.—A defect in a highway may consist in the failure to erect barriers at a place where they are needed. *Bryant v. Town of Randolph*, 133 N. Y. 79; *Ivory v. Town of*

Deerpark. 116 N. Y. 476, in which case it was held that if an excavation is so near the beaten track of a highway as to render it dangerous to public travel within reasonable apprehension, it is the duty of the commissioners to use the means available to them for the purpose of guarding it, and for every omission to do so an action will lie against the town under the statute. The necessity of barriers upon a town highway, including the question as to whether or not the highway commissioners were negligent in omitting to supply them and keep them in repair, is generally a question of fact for the jury. Coney v. Town of Gilboa, 55 App. Div. 111; Van Gaasbeck v. Town of Saugerties, 82 Hun 415; Wood v. Town of Gilboa, 76 Hun 175; Waller v. Town of Hebron, 5 App. Div. 577. So that where it appeared that a highway had been substantially in the same condition for 68 years, it was for the jury to determine whether a failure to erect a barrier at the place where the accident occurred was such a defect in the highway as to impose upon the town liability for damages incurred. Maxim v. Town of Champion, 50 Hun 88.

Degree of care.—The towns in this state are not required to maintain the highways within their borders in a condition of absolute safety, and their commissioners of highways are not bound to constant vigilance and inspection of the roads. Ordinary care is the limit of responsibility. Dorn v. Town of Oyster Bay, 84 Hun 510; Lane v. Town of Hancock, 142 N. Y. 510. The ordinary care required is such as to enable the commissioners to see that the highways and bridges in their towns are reasonably safe for the public use. This duty fairly implies that some attention should, within due time, be given to each bridge of sufficient size to be dangerous to travel, if in a defective condition. Clapp v. Town of Ellington, 87 Hun 542, aff'd. 154 N. Y. 781. Towns are not to be held liable for injuries resulting from accidents which are not by the exercise of reasonable forethought and prudence to be anticipated: so where a commissioner has kept the highways in a condition which is reasonably safe for general and ordinary travel, there can be no liability for injuries to a bicycle rider occasioned by a slight defect, of a nature as not to produce injury to an ordinary user of the highway. Sutphen v. Town of North Hempstead, 80 Hun 409. The degree of care to be used in maintaining the highways in a safe condition is less in remote and sparsely settled district than in a thickly populated community. Glasier v. Town of Hebron, 131 N. Y. 417. Commissioners of highways are charged with the duty of vigilance and watchfulness in ascertaining the con-

dition of the highways, and they must exercise proper care in maintaining them in a reasonably safe condition for all ordinary travel. *Embler v. Town of Wallkill*, 57 Hun 384. In the exercise of such vigilance the commissioners may rely somewhat upon the performance by the overseers of their duties, but they should be required to use reasonable diligence to learn whether or not the overseers have proceeded with the performance of their work, and if they have not, to take such measures as may be necessary to provide for the proper maintenance of the highways. *Farman v. Town of Ellington*, 46 Hun 41.

Negligence of commissioners.—Under the provision of the Act of 1881, and also under the above section a town is not liable unless upon the same facts its commissioner of highways would have been liable before the passage of that act; and therefore a town is not liable unless negligence on the part of the commissioner is shown. *Clapper v. Town of Waterford*, 131 N. Y. 382. The negligence of the commissioner is an essential element in all cases arising under the statute. *McGuinness v. Town of Westchester*, 66 Hun. 356; *Bidwell v. Town of Murray*, 40 Hun. 190; *Whitney v. Town of Tieconderoga*, 127 N. Y. 40, 44.

To impose upon a town a liability under the statute, it must appear that the proximate cause of the injury was a failure upon the part of the highway commissioner of the town in the performance of his duties to use ordinary care under all the circumstances of the case. The liability of a town is purely statutory and in derogation of the common law, and the statute, therefore, must be strictly construed. The negligence of the highway commissioner which will render his town liable in such cases is negligence which creates or permits such a defect in a highway as interferes with public travel upon it. *Barber v. Town of New Scotland*, 88 Hun. 522, aff'd 147 N. Y. 722.

Negligence when applied to a commissioner of highways may be defined as the omission on his part to use ordinary care, under all the circumstances, in the performance of the duty imposed upon him by law, which was the proximate cause of the accident. *Lane v. Town of Hancock*, 142 N. Y. 510. The care required of a highway commissioner is only such as a reasonably prudent person would ordinarily exercise under the circumstances. *Waller v. Town of Hebron*, 5 App. Div. 577.

If the negligence of the commissioner consists in the laying out, or construction of the road, the town is not liable therefor. *Monk v. Town of New Utrecht*, 104 N. Y. 552. In this

case the court said: "The commissioners were called upon, in constructing a plan of highway construction, to decide upon the safety of the route adopted, and the dangers to be encountered, and if safeguards were necessary to protect travelers passing dangerous places, to provide them, and if they failed to do so, it constituted simply a defect in the plan of the work arising from an error in judgment as to its necessity. From such errors it is well settled that no liability arises."

In determining the question of the negligence of commissioners of highways the whole situation and all the facts and circumstances must be kept in view, so where it appeared that there were about 230 miles of road in a town, 80 of which are along dug ways and up steep ravines, and the road where the accident occurred passed through a mountainous wooded section, and was used mainly for drawing heavy loads of lumber, and for a distance of five miles but two or three families lived upon it, the commissioners cannot be charged with negligence in failing to erect barriers because of which the plaintiff's intestate was injured and killed. *Lane v. Town of Hancock*, 142 N. Y. 510.

In the case of *Riley v. Town of Eastchester*, 18 App. Div. 94 it was held that the commissioner of highways is not negligent in failing to guard against a defect which was only a few hours old, and so latent in character that a daily driver over the highway neither saw nor suspected any danger as he approached the place.

The defect resulting from the negligence of the commissioner in order to authorize an action under the above section must pertain to the highway itself. So where the alleged negligence consisted in failing to keep a certain culvert in proper repair, and it appeared that a creek flowed through such culvert in a turnpike near the plaintiff's premises, and then after crossing the turnpike flowed through the plaintiff's lands; that this culvert had been built many years before by a turnpike company, that for some years prior to the injury complained of the culvert had proved insufficient to carry off the stream in times of rain, and that on certain occasions when there were severe storms the water backed up, overflowed the turnpike, ran from it to and over the plaintiff's lands, and damaged them, it was held that there being no defect in the highway proper, there was no negligence of the highway commissioner in failing to provide a culvert to carry off water in times of freshet. *Barber v. Town of New Scotland*, 88 Hun 522. In the case of *Robinson v. Town of Fowler*, 80 Hun 105, it was held that an action cannot be maintained against

a town for negligence of the highway commissioners in blasting rock for the purpose of widening a highway so that vehicles could pass each other, since the injury was not caused by a defect in the highway itself. The long continued existence of an excavation in a highway, without any guard around it, with actual knowledge thereof by one of the commissioners of highways of the town, is sufficient to establish negligence on the part of the commissioners and impose a liability upon the town. *Smith v. Town of Clarkstown*, 69 Hun 155. Whether or not the commissioner is negligent in failing to erect a proper barrier at such a place is a question of fact for the jury. *Hewett v. Town of Thurman*, 41 App. Div. 6; *Coney v. Town of Gilboa*, 55 App. Div. 111.

Want of funds as a defense.—Before the act of 1881, imposing upon a town liability for injuries occasioned by defects in highways, caused by the negligence of commissioners of highways, want of funds in their hands available for repairs was always a defense in an action against commissioners for their negligence. The rule was that "it is the duty of commissioners of highways to repair defective highways or bridges after notice of their condition, with reasonable and ordinary care and diligence, if they have sufficient funds in their hands, or authority to procure such funds; and neglect of this duty renders them liable in a civil action to any person specially injured thereby. *Hover v. Barkhoof*, 44 N. Y. 113. See also *People ex rel Van Keuren v. Town of Esopus*, 74 N. Y. 310; *People ex rel Everett v. Board of Supervisors*, 93 N. Y. 397 holding that commissioners themselves are charged with no duty in respect to the care of the highways of the town, save so far as they are furnished with the power to provide, or are previously provided with funds by the town to accomplish such purpose; *Hines v. City of Lockport*, 50 N. Y. 236; *Barker v. Loomis*, 6 Hill, 463.

The act of 1881 transferred the liability for such defects from the commissioners to the towns, to be imposed upon the same facts as formerly existed in the case of the commissioners. So where in an action under such an act against a town it appeared that the commissioners had no funds in their hands to make repairs, or power to raise such funds, the town was not liable. *Clapper v. Town of Waterford*, 131 N. Y. 382; *Monk v. Town of New Utrecht*, 104 N. Y. 552; *Bullock v. Town of Durham*, 64 Hun. 380.

The above section of the highway law has not changed the rule in this respect, and the law now is that where the commissioners have not sufficient funds to make all needed repairs

and are not delinquent in their efforts to procure them, there is no basis for a liability of the town for a defect in the highways, which they, of necessity did not repair, and it is within their discretion to decide which repairs to make in case they cannot make all of them. *Young v. Town of Macomb*, 11 App. Div. 480; *Boyce v. Town of Shawangunk*, 40 App. Div. 593; *Quinn v. Town of Sempronius*, 33 App. Div. 70. The commissioners must have used due diligence in securing available funds. But where it appeared that the supervisor of the town had funds in hand applicable to repair highways, but had not paid them over to the commissioners who had demanded them, the town is not liable, in the absence of evidence tending to show negligence on the part of the commissioner in instituting some proper proceedings to compel payment to him. *Clapper v. Town of Waterford*, 131 N. Y. 382.

The commissioners have a judgment to exercise as to the relative importance of different expenditures required where his resources are limited, and an error therein, unless itself induced by negligence, does not charge the town with liability for injuries received at the part of the highway which did not receive the benefit of the expenditures made. *Patchen v. Town of Walton*, 17 App. Div. 158. But where the commissioners were shown to have known of a defect in a highway for two years, and the amount required to make the repairs was small, the presumption is against the commissioners having performed their full duty in attempting to raise the necessary funds. *Warren v. Clement*, 24 Hun. 472. It is no answer to the demand which the law makes upon a commissioner to repair dangerous places in the highways, that the money in his hands had been designated for payment upon ordinary contracts for work. *Rhines v. Town of Royalton*, 40 N. Y. S. Rep. 662, 15 N. Y. Supp. 944. The want of funds is always a matter of defense and the plaintiff need not plead or prove that sufficient funds were in the commissioners' hands available for the repair of the alleged defect. *Oakley v. Town of Mamaroneck*, 39 Hun. 448. The want of funds or the means of procuring them is always a matter of defense, the burden of proving which is upon the town. *Whitlock v. Town of Brighton*, 2 App. Div. 21; *McMahon v. Town of Salem*, 25 App. Div. 1; *Quinn v. Town of Sempronius*, 33 App. Div. 70; *Boyce v. Town of Shawangunk*, 40 App. Div. 593; *Getty v. Town of Hamlin*, 46 Hun. 1; *Bidwell v. Town of Murray*, 40 Hun. 190; *Clapper v. Town of Waterford*, 131 N. Y. 382; *Hover v. Barkhoof*, 44 N. Y. 113, 118.

In other words, to relieve a town from liability to one who has been injured by the neglect of its commissioners of highways to repair a defect known by him to exist in a public highway, it is not sufficient to show that the commissioners had no funds in their possession wherewith to cause the necessary repairs to be made, but it must also be shown that they had sought through the proper channels to procure the same. If the commissioners have no funds and none have been raised in the ordinary manner, and it clearly appears that the highway is unsafe, they can apply to the town board for consent to make necessary repairs as provided in section ten of the Highway Law, (*ante p. 42*). Having such means at their command it is incumbent upon them to avail themselves thereof, and a failure so to do is negligence for which the town will be liable. *Whitlock v. Town of Brighton*, 2 App. Div. 21; *Quinn v. Town of Sempronius*, 33 App. Div. 70. In order to make the defense as to funds complete, it must appear not only that there was a lack of funds, but an inability, by the exercise of reasonable diligence, to obtain them. *McMahon v. Town of Salem*, 25 App. Div. 1.

Notice of defect.—The defect must have existed for a sufficient period to raise a presumption that the commissioners had notice thereof. A commissioner cannot be charged with notice of a defect which had existed only for a few hours, and was so latent in character that a daily driver over the highway neither saw nor suspected any danger as he approached the place. *Riley v. Town of Eastchester*, 18 App. Div. 94. But the existence, for two weeks prior to the accident of a hole two feet wide in the foot walk of a bridge is sufficient to impute notice to the commissioners and charge them with notice. *Foels v. Town of Tonawanda*, 75 Hun. 363. And the existence of a bridge for four years without guards is sufficient to raise an inference that the commissioners had notice of the defect. *Bulleck v. Town of Durham*, 64 Hun. 380. And where a defect in a highway causing the injury was in existence for more than ten years the commissioners are charged with notice of the dangerous condition. *Ivory v. Town of Deerpark*, 116 N. Y. 476.

The rule is that notice to the commissioners is notice to the town, and it may be implied from a continued existence of the defect. *Spencer v. Town of Sardinia*, 42 App. Div. 272; *Maloy v. Town of Pelham*, 4 N. Y. H. Ref. 823. And it is not necessary that the particular commissioner in office at the time of the accident should have had notice of the defect. *Shaw v. Town of Potsdam*, 11 App. Div. 508; *Allen v. Town of Allen*, 33 App. Div. 463.

Notice of claim.—The notice required by the above section need not have all the formalities of a bill of particulars, and is sufficient if it brings the general nature of the claim to the attention of the supervisor. *Quinn v. Town of Sempronius*, 33 App. Div. 70. But a verified notice of the claim is an absolute condition precedent to the maintenance of an action against the town for which the courts have no power to permit a substitute. A letter from the plaintiff's attorney to the supervisor of the town is not sufficient, although the town officers investigated the plaintiff's claim upon the receipt of such letter, and even attempted to negotiate a settlement thereof. The supervisor cannot waive the filing of the verified statement. *Borst v. Town of Sharon*, 24 App. Div. 599.

A notice containing a general allegation of a defect in the highway, stating that the highway was narrow and had no barriers, as a result of which the plaintiff's wagon was overturned, and he was injured, and the plaintiff was free from contributory negligence, was held sufficient although not expressly alleging the negligence of the town. *Quinn v. Town of Sempronius*, 33 App. Div. 70. A verified statement in the following form:

"Town of Sardinia.

To Ella D. Spencer, administratrix of the estate of Frank Spencer, late of the town of Sardinia, Erie County, N. Y., debtor.

To damages resulting from the death of Frank Spencer, caused by the breaking of an unsafe and defective bridge in the highway in said town, near the residence of Mr. Henshaw, \$20,000.

Dated, Sardinia, N. Y., November 5, 1897.

(Signed.) ELLA D. SPENCER,
Administratrix."

was held sufficiently definite and specific to give the authorities of the town opportunity to investigate and determine whether they would allow the claim. *Spencer v. Town of Sardinia*, 42 App. Div. 472.

The mailing of a copy of a verified statement of a claim against a town, for damages resulting from an alleged defect in one of its highways, to the town clerk or town board of the town, which copy was actually received by the supervisor of the town, and the claim considered by the town board, constitutes a sufficient compliance with the above section. *Soper v. Town of Greenwich*, 48 App. Div. 354.

§ 17. Action by town against commissioners.—If a judgment shall be recovered against a town for damages to person or property, sustained by reason of any defect in its highways, or bridges, existing because of the neglect of any commissioner of highways, such commissioner shall be liable to the town for the amount of the judgment, and interest thereon; but such judgment shall not be evidence of the negligence of the commissioner in the action against him.

The negligence of a commissioner of highways, in permitting defects to exist in highways, because of which injuries are occasioned to persons traveling thereupon, has been considered in the note to the preceding section. The above section is also derived from L. 1881, chap. 700, which act, as has already been stated, substituted the liability of the town for the liability of the commissioners, where such commissioners are negligent in the performance of their duties. The legislature in thus transferring the liability saw fit to protect the town against the negligence of the commissioners by permitting an action to be brought by the town against such commissioners where recoveries had been had against the town for such negligence.

The negligence of the commissioner, although established in the action against the town, must be again proved in the action by the town against the commissioners. Notwithstanding the remedy afforded the town under this section, and the frequency of cases arising where towns have been liable for defects in highways caused by the negligence of commissioners, actions are seldom brought by towns against their commissioners, and if brought are usually unsuccessful. *Lane v. Town of Hancock*, 142 N. Y. 510.

§ 18. Audit of damages without action.—The town board of any town may audit as a town charge, in the same manner as other town charges are audited, any one claim not exceeding five hundred dollars, for damages to person or property, heretofore or hereafter sustained by reason of defective highways or bridges in the town, if in their judgment it be for the interest of the town so to do; but no claim shall be so audited, unless it shall have been presented to the supervisor of the town.

within six months after it accrued, nor if an action thereon shall be barred by the statute of limitations. The town board may also audit any unpaid judgment heretofore or hereafter recovered against a commissioner of highways for any such damages, if such town board shall be satisfied that he acted in good faith, and the defect causing such damage did not exist because of the negligence or misconduct of the commissioner, against whom such judgment shall have been recovered.

The audit of damages arising by reason of defective highways or bridges should be made in the same manner as the audit of other town charges. Presentation of a claim for such damages should be made at the meeting of the town board held on the Thursday preceding the annual meeting of the board of supervisors as provided in section 162 of the Town Law. The provisions of the Town Law, §§ 162, 170, relating to the audit of town accounts apply in all respects to the audit of such claims.

Judgments against a town for damages sustained by reason of defective highways or bridges are town charges. Town Law, § 180. Such judgments may be paid by the supervisor if he have sufficient moneys in his hands belonging to the town not otherwise especially appropriated, upon the production of a certified copy of the docket thereof. General Municipal Law, § 20. But such judgments being town charges must first be presented to the town board for audit. Town Law, § 180. If there are no moneys on hand available for the payment of such judgments, moneys necessary to defray the same must be levied on the taxable property in such town by the board of supervisors. Town Law, § 180. Whenever such a judgment exceeds \$1,000 the town board may borrow the sum necessary to pay the same by the issue of bonds to be signed by the supervisor and attested by the town clerk. Town Law, § 189.

§ 19. Reports of commissioners.—The commissioners of highways of each town shall make to the town board, at its meeting held on the Tuesday preceding the biennial town meeting, and on the corresponding date in each alternate year, or, in towns where the biennial town meetings are held at the time of the general election, on the third Tuesday of December in each year a written report stating,

1. The labor assessed and performed;
2. The sum received by them for penalties, commutations and all other sources, and an itemized account of all moneys paid out during the year, with receipts or vouchers in full by the respective parties to whom such money was paid, which account and each and every receipt or voucher is to be filed forthwith with the town clerk of the town, and be open to public inspection during the office hours of such clerk. (Amended by L. 1902, chap. 258.)
3. The improvements which have been made on the highways and bridges, during the year immediately preceding such report, and the state of such bridges, and the highways in each highway district; they shall also make at the second meeting of said board in each year, a statement of the improvements necessary to be made on such bridges, and the highways in each highway district, and an estimate of the probable expense thereof, beyond what the labor to be assessed in that year will accomplish; a duplicate of which shall be delivered by the commissioners to the supervisor of the town, who shall present such duplicate statement to the board of supervisors, who shall cause the amount so estimated, not exceeding five hundred dollars in any one year, to be assessed, levied and collected in such town, in the same manner as other town charges. (Whole section amended by L. 1901, chap. 35, and subdivision three amended by L. 1901, chap. 437.)

Meetings of town board.—Under section 160 of the Town Law, as amended by L. 1904, chap. 57, the town board is required to hold at least two meetings annually at the office of the town clerk, as follows: "One on the Tuesday preceding the biennial town meeting, and on the corresponding date in each alternate year, except that in towns where biennial town meetings are held at the time of a general election, such meeting shall be held on the 28th day of December in each year, unless such day is Sunday, in which case such meeting shall be held on the preceding day; and one on the Thursday next preceding the

annual meeting of the board of supervisors." The meeting on the third Tuesday in December of each year where town meetings are held at the time of the general election mentioned in the above section was the first of the regular meetings of the town board mentioned in the above section of the Town Law, prior to the amendment of 1904. As the law now stands the town board will not hold a regular meeting on the third Tuesday in December, but such meeting will be held on the 28th day of December. It is probable that the change made in the date of holding this meeting by the amendment to the Town Law of 1904 also effects a change in the above section so that the reports of commissioners in towns where town meetings are held on general election day may be submitted to the town board at its meeting held on the 28th day of December. This construction is sustained by the fact that under section 161 of the Town Law, as amended by L. 1904, chap. 57, all town officers are required to account to the town board at its meeting held on the 28th day of December for all moneys received and disbursed by them by virtue of their offices.

Penalties recovered by commissioners of highways belong to the town and must be accounted for by such commissioners. *Albro v. Rood*, 24 Hun. 72; *People ex rel Loomis v. Town Auditors*, 75 N. Y. 316.

Statement of improvements; estimate of expenses.—The statute makes it the commissioner's imperative duty to make a statement of the necessary improvements to be made on bridges and highways in each highway district, and an estimate of the probable expense thereof, to the town board at its second meeting, that is the meeting held on the Thursday prior to the annual meeting of the board of supervisors. A duplicate of such statement and estimate must be delivered to the supervisor of the town. The supervisor must then lay such statement and estimate before the board of supervisors at its next meeting, and the board is then required to cause the amount to be assessed upon and collected in the town. *Lament v. Haight*, 44 How. Pr. 1; *Wells v. Town of Salina*, 119 N. Y. 280. The object of providing for such statement and estimate is to enable the town to raise money for highway purposes by annual taxation rather than by incurring indebtedness or borrowing money. *Wells v. Town of Salina*, 119 N. Y. 280, 290.

Where the appropriation for the improvement of highways and bridges of a town made under the above section is insufficient, the proper course is for the commissioner of highways to apply, under sections 10 and 11 of the Highway Law, to the

town board for consent to make the necessary improvements. In the absence of such consent the commissioner of highways has no power to proceed with the improvements, and apply in payment therefor the appropriation for the succeeding year; and expenditures so made create no legal claim against the town. People ex rel Peterson v. Clark, 45 App. Div. 65. The commissioner cannot go beyond the statement of improvements and the estimate of expense therefor and incur indebtedness which will be binding upon the town unless authorized by the town board as provided by statute. Robinson v. Town of Fowler, 80 Hun. 101; People ex rel Bevans v. Supervisors, 82 Hun. 300; Lyth v. Town of Evans, 33 Misc. 221.

The reports of the commissioners to the town board may be in the following form:

FORM NO. 23.

Commissioners' Report to First Meeting of Town Board.

The undersigned, commissioners of highways of the town of in the county of, hereby render to the town board of said town, in pursuance of §19 of the Highway Law, the following report:

1. The highway labor assessed in said town for the year ending on 19, was days; and the highway labor performed in said town during the said year was days, as appears by the reports rendered to us by the several overseers of highways in said town.

2. The said commissioners have received during the said year the following sums of money for fines and commutations, and from other sources:

DATE.	FROM WHOM RECEIVED.	ON WHAT ACCOUNT.	AMOUNT.

1. They have paid out during said year, for which they have receipts in full, which are hereto attached the following sums:

DATE.	TO WHOM PAID.	ON WHAT ACCOUNT.	AMOUNT.

4. The improvements which have been made on the highways and bridges in said town during said year are as follows: (Specify improvements.) And the highways and bridges in said town are (specify the condition they are in).

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

FORM NO. 24.

Commissioners' Report to Second Meeting of Town Board.

The undersigned, commissioners of highways of the town of in the county of hereby render to the town board of said town pursuant to subdivision 2 of §19 of the Highway Law, the following report:

1. The following improvements are necessary to be made on the highways and bridges in said town during the next fiscal year, viz. (Here specify the improvements deemed necessary.)

2. The probable expense of making such improvements beyond what the labor to be assessed will accomplish, is by us estimated at \$.....

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 20. General duties of overseers.—Each overseer of highway in every town, shall

1. Repair and keep in order the highways within his district

2. Warn all persons and corporations assessed to work on the highways in his district, to come and work thereon.

3. Cause the noxious weeds within the bounds of the highway within his district, to be cut down or destroyed twice in each year, once before the first day of July, and again before the first day of September; and the requisite labor therefore shall be considered highway work.

4. Collect all fines and commutation money, and execute all lawful orders of the commissioners.

5. Cause all loose stone lying in the beaten track of every highway within his district, to be removed once in every month from the first day of April until the first day of December, in each year. Stones so removed shall not be thrown into the gutter, nor into the grass adjoining such highway, but shall be conveyed to some place, from which they shall

work back or be brought back into the track by the use of road machines or other implements used in repairing such highways. Any person who shall violate the provisions hereof or who shall deposit or throw loose stones in the gutter or grass adjoining a highway or shall deposit or throw upon a highway ashes, papers, stones, sticks, or other rubbish, to the detriment or injury of the public use of, or travel upon such highway, shall be liable to a penalty of ten dollars, to be sued for and recovered by the commissioner or commissioners of highways, or in case of his or their refusal or neglect to act, by any taxpayer of the town in the name of the town in which the offence shall be committed, and when recovered, one-half of the amount shall be applied by them in improving the highways and bridges in such town. The other half shall be paid to the person upon whose written information the action was brought. Any commissioner of highways who shall neglect to prosecute for or join in an action with the other commissioners of highways to recover such penalty, knowing the same to have been incurred, or within twenty days after a sworn statement has been laid before them showing that a party is liable to such penalty, shall be guilty of a misdemeanor. (Amended by L. 1898, chap. 352, L. 1901, chap. 54, and L. 1902, chap. 166.)

6. Cause the monuments erected or to be erected, as the boundaries of highways, to be kept up and renewed, so that the extent of such highway boundaries may be publicly known.

Highway districts.—The commissioners of highways, not oftener than once a year, are required to divide their town into as many highway districts as they shall judge convenient. In towns which have adopted the money system of taxation the commissioners may divide such towns into highway districts whenever in their judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow. Highway Law, § 4, sub. 3, ante p. 26.

Appointment of overseers of highways.—The highway commissioner, on the 15th day of April of each year, is required to make and file with the town clerk, a written appointment of a resident of each highway district to be overseer of highways therein, and the town clerk is required to notify each person so appointed of his appointment, within ten days after the filing thereof. Highway Law, § 4, sub. 5, ante p. 28.

Qualifications.—An overseer of highways is a town officer and every elector of the town is, therefore, eligible to hold such office. Town Law, § 50. A person is not qualified to serve as overseer of highways unless he resides within the highway district for which he is appointed. Highway Law, § 4, sub. 5, ante. p. 28; Public Officers Law, § 3.

Oath of office.—The overseer of highways being a town officer is required to take and subscribe an oath of office and file the same in the office of the town clerk. See Town Law, § 51. Such oath may be administered and certified by the town clerk, and must be filed within eight days after the overseer's appointment, in the town clerk's office. Town Law, §§ 51, 56.

Form of oath.—The form of an official oath as prescribed by the Constitution, Art. 13, § 1, is as follows:

"I do solemnly swear, (or affirm), that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of overseer of highways in the —— district of the town of ——, according to the best of my ability."

Acceptance of office.—No formal acceptance on the part of a person appointed to the office of overseer is necessary. The filing of an oath is deemed an acceptance of the office. Town Law, § 51. When the overseer accepts the warrant of the commissioner, as it is commonly called, his acceptance of the office is deemed conclusive. Highway Law, § 34.

Vacancy.—If a person appointed overseer refuses to serve or his office becomes vacant, the commissioners must, in the same manner as for an original appointment, appoint some other person to be overseer. Highway Law, § 4, sub. 5, ante p. 28. This does not authorize commissioners to reappoint the same person after his refusal or neglect to serve on the first appointment. They are to appoint some other person in his stead.

Penalty for refusal to serve.—A person appointed to the office of overseer of highways, who refuses or neglects to serve, forfeits to the town the sum of \$10. Such penalty may be sued for by the commissioner of highways in the name of the town to be

applied by him in improving the highways and bridges of the town. Town Law, § 55.

Repair of highways.—The overseers, in repairing and keeping in order highways, are subject to the orders and directions of the commissioners of highways, but a failure on the part of the commissioners to give such orders or directions does not relieve the overseers from their duty in keeping the highways in repair. The obligation in respect to repairs is statutory. They are bound to keep the highways in their district in repair, whether they receive special instructions from the commissioners of highways or not. *McFadden v. Kingsbury*, 11 Wend. 667; *Wendell v. Mayor of Troy*, 39 Barb. 329.

The overseers are subordinate officers acting under the direction of the commissioners, who have the general supervision of the subject of highway repair and maintenance. *Farman v. Town of Ellington*, 46 Hun. 41; *Bartlett v. Crozier*, 17 Johns. 439; *Smith v. Wright*, 27 Barb. 621.

It is their duty to provide a suitable pathway for carriages and vehicles, of proper width and so define it that there shall be no reasonable danger of its being mistaken; but they are not required to grade the whole space within the limits of the road, so that travellers can drive over every part of it. *Ireland v. Owego, etc. Plank Road Co.*, 13 N. Y. 526. But in the performance of their duty to keep in repair the highways in their respective districts, overseers have jurisdiction over every part of the highway to its entire width. *Anderson v. VanTassel*, 53 N. Y. 631. In this case it was held that the overseer of highways, who had taken material from the side of a highway necessary for the repairs of the carriage-way at the same point, was not liable to the owner of the adjoining land, although the latter had made some improvements by way of grading and levelling the ground from whence the material was taken, in the absence of proof that the overseer had acted wantonly or maliciously, and where it did not appear that the character of the improvements or the condition of the highway rendered it improper to take the material.

The word "highways" as included in subdivision 1 of the above section does not include bridges. *Day v. Day*, 94 N. Y. 153, 159. This question is fully discussed by Chancellor Kent in the case of *Bartlett v. Crozier*, 17 Johns. 439, where he demonstrates that statutes merely providing for the creation of road districts and the performance of highway labor thereon do not apply to bridges; and that the duty of overseers to repair and keep in order the highways within the districts for which they

are appointed does not include that of repairing bridges. See also *Taylor v. Town of Constable*, 57 Hun. 371.

Warning taxpayers to work on highways.—The overseers are required, when directed by the commissioners, to warn all persons and corporations assessed for highway labor to go and work thereon, with such teams and implements, and at such times as such commissioners may direct. Highway Law, § 4, sub. 6, ante p. 30. The notice to be given by overseers to persons and corporations assessed to work upon the highways is prescribed by sections 60 and 61 of the Highway Law, and will be hereafter considered. See post, pp. 163, 164.

Destruction of noxious weeds.—The electors of a town may, at their biennial town meeting, make provisions and allow rewards for the destruction of noxious weeds, and may raise money therefor. Town Law, § 22, sub. 5. Boards of supervisors may make such laws and regulations as they deem necessary for the destruction of noxious weeds within the county. County Law, § 12, sub. 7. The overseers of each district are required to give written notice to any owner or occupant of premises adjoining the highway to cut all weeds, briars and brush growing within the bounds of the highways. Highway Law, § 71, post p. 143. In towns which have adopted the money system, commissioners of highways are required to notify abutting owners to destroy noxious weeds and brush growing along the ~~sides~~ of the highway. Highway Law, § 53a, post, p. 120.

Injurious substances in highways.—A person who wilfully throws, drops or places, or causes to be thrown, dropped or placed, upon any road, highway, street or public place, any glass, nails, pieces of metal or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor. Penal Code, § 661.

Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, or shall cause or procure to be thrown, dropped or placed, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or place, any glass, tacks, nails, pieces of metal, brier, thorn or other substance which might injure, or puncture any tire, used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor, and on conviction be fined not less than five nor more than fifty dollars. Penal Code, § 654a.

Overseers in towns which have adopted the money system.—In towns which have adopted the money system the highway commissioner may divide the town into highway districts whenever

in his judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow. The overseers of highways appointed in highway districts in such towns shall perform such duties in respect to the maintenance and repair of highways and the opening of highways obstructed by snow in the districts for which they are appointed as are prescribed by the highway commissioners of such towns. Highway Law, § 4, subs. 3 and 5, as amended by L. 1904, chap. 611, ante, p. 26.

Indictment for willful neglect.—An overseer of highways may be indicted for a willful neglect to keep the roads in his district in repair under section 154 of the Penal Code, which reads as follows:—"Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding a public trust or employment, every willful omission to perform such duty where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor."

§ 21. Opening obstructed highways.—Whenever the labor in any district has been worked out, commuted for, or returned to the supervisor or in those towns that have adopted the money system of taxation for working the highways, the moneys voted at the town meeting for the removal of obstructions caused by snow and the prevention of such obstructions has been expended and the highways are obstructed by snow, and notice has been given to the overseer or highway commissioner in writing, by any two or more inhabitants of the town, liable to the payment of highway tax, requesting the removal of such obstruction, the overseer of highways in such district or the highway commissioner of the town shall immediately call upon all persons, corporations and occupants of lands owned by non-residents liable to highway tax therein or in the locality where such obstruction exists, to assist in removing such obstruction and such labor so called for by the overseer or highway commissioner, shall be assessed upon those liable to perform the same or in the locality where such obstruction exists, in proportion to their original assessments. Should any persons, corporations or occupants of

lands owned by non-residents so called out neglect or refuse to appear at the place designated by the overseer or the commissioner of highways, or to commute at a dollar a day within twenty-four hours after due notice, the overseer or commissioner of highways shall cause the obstruction to be immediately removed, and on or before September first of each year, or at such other time as the board of supervisors may by resolution prescribe, make out a list of all persons, corporations or occupants of lands owned by nonresidents who shall fail to work out such labor or commute therefor, with the number of days not worked or commuted for by each, charging for each day in such list at the rate of one dollar and fifty cents per day, verified to the effect that such persons, corporations or occupants of lands owned by non-residents have been notified to appear and perform such labor or commute therefor, and that the same has not been performed or commuted; said list shall be certified by the commissioner of highways of such town to the town board and by said town board to the board of supervisors, and the amount of such arrearages shall be levied by said board of supervisors against and collected from the real or personal estate of such persons and corporations and from the real estate owned by nonresidents specified in such list in the manner now provided by law for the return, assessment and collection of arrearages for unperformed highway labor. Each overseer of highways and highway commissioner neglecting to perform such duty shall be liable to a penalty of five dollars per day, for every day he neglects, without good and sufficient reasons, to have such highway opened after receiving such written notice, and for each day after September first or the day so fixed, he neglects to make out, verify and deliver such list, the penalty to be collected in justice's court, by the supervisor in the name of the town, and paid over to the highway fund of the town. No persons or corporations shall be allowed any sum for highway labor performed in removing obstructions

in his judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow. The overseers of highways appointed in highway districts in such towns shall perform such duties in respect to the maintenance and repair of highways and the opening of highways obstructed by snow in the districts for which they are appointed as are prescribed by the highway commissioners of such towns. Highway Law, § 4, subs. 3 and 5, as amended by L. 1904, chap. 611, ante, p. 26.

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scribe highways and places obstructed by snow), I immediately called upon all persons, corporations and occupants of land owned by non-residents liable to highway tax in such district, (or in the locality where such obstructions exist), to assist in the removal of the snow obstructing such highways. The following persons, (corporations or occupants of lands owned by non-residents, if any) who were so called out, neglected or refused to appear at the place designated by me, or to commute at a dollar a day within twenty-four hours after due notice was given to them. The number of days not worked or commuted for by each of such persons is included in such list and they are charged for each such work at the rate of \$1.50 per day, as provided in section 21 of the Highway Law.

Name of Person:	Number of Days:	Amount Charged.
John Doe	three	\$4.50
Samuel Brown	one	1.50

State of New York
County of.....
Town of.....} ss.

A. B. being duly sworn deposes and says: That he is the overseer of highways for the.....highway district of the town of.....That on the.....day of.....he notified the persons named in the above list to appear and perform labor in the removal of snow obstructing the above mentioned highways at the places indicated, or to commute therefor, and that no part of the labor assessed to them was performed or commuted.

Subscribed and sworn to
before me this.....day of....., 19....

Certificate of Commissioner.

To....., Town Board of.....:

I, C. D., commissioner of highways of the town of....., do hereby certify that I have examined the above list of persons (corporations or occupants of lands owned by non-residents, if any) who have failed to work or commute for labor in the removal of snow obstructing the highways described therein and that the same is correct.

C. D., Commissioner of Highways.

Construction or removal of fences to prevent snow blockade.—
An inhabitant subject to a highway tax, who shall remove a fence along a public highway for the purpose of preventing the drifting of snow, may be allowed by the overseer of highways an abatement of his highway tax, for the time actually expended by him in removing such fence. Highway Law, § 72, post, p. 145.

L. 1890, ch. 291, authorizes the construction of wire fences along highways to prevent snow blockades, if money is appropriated therefor by the vote of the electors of a town. Such act is as follows:—

"It shall be lawful for the commissioner of highways of any town in this state to apply in open town meeting for a vote authorizing such sum, not to exceed three hundred dollars in any one year, to be raised, in addition to the sums now allowed by law, as they may deem necessary for the purpose specified in the third section of this act. The same notice shall be given by the

commissioners of their intention to apply for the raising of such additional sum as is now required by law for the raising of money for roads and bridges, above the amount of two hundred and fifty dollars. (L. 1890, ch. 291, § 1.)

If the town meeting shall, by their votes, determine that a sum shall be raised for the purpose specified in this act, the proceedings for certifying and levying, collecting and paying the same shall be in all respects the same as now provided by law for the raising and paying over of money for roads and bridges, above the amount of two hundred and fifty dollars. (Idem, § 2.)

The commissioners of highways shall expend the money raised under the provisions of this act in the purchase of fence wire, in the same manner as other supplies for highway purposes are by law required to be purchased, and no part of such money shall be expended, except for the purchase of fence wire as aforesaid; and the said commissioners are hereby authorized to contract with the owners of the lands lying along the highways of their respective towns, at such points as are liable to snow blockade, for the removal of the fences now standing along the boundaries of such highways, and the replacing of such fences with wire fences. And they may contract to deliver to said land owners, fence wire to be used in the construction of such fences, without charge to said land owners, at the place of purchase, but they shall not agree to pay any part of the cost of the removal or construction called for by said contracts, or to make any payment to said land owners as a compensation for the construction of fences. (Idem, § 3.)

The fences to be built under the provisions of this act, shall be of four strands of wire with a substantial bar of wood at the top; and the construction of said fences, and the size of said top bars and of the posts and supports of said fences, and their distance apart shall be such as said commissioners shall prescribe. Whenever such fence or fences shall become so out of repair as to be dangerous to animals passing along the highways, it shall be the duty of the owner or owners of said fence or fences to immediately repair or remove the same. (Idem, § 4.)

Whenever the commissioner of highways of any town shall contract for the removal of any fence, under the provisions of this act, they shall file in the office of the town clerk of said town, a description of that portion of the highway to which said contract shall apply, and thereafter, it shall not be lawful for any person to replace the fence so contracted to be removed, with any fence liable to cause the drifting of snow. (Idem, § 5.)

§ 22. Penalties against overseers.—Every overseer of highways who shall refuse or neglect,

1. To warn the persons and corporations assessed to work on the highways, when he shall have been required so to do, by the commissioners or either of them.

2. To collect the moneys that may arise from fines or commutations.

3. To perform any of the duties required by this chapter, or which may be enjoined on him by the commissioners of highways of his town, and for the omission of which no other penalty is provided, shall for every such refusal or neglect, forfeit the sum of ten dollars.

Penalty for refusal to serve.—A person chosen or appointed to the office of overseer of highways, who shall refuse to serve, is liable to a penalty in the sum of ten dollars. Town Law, § 55. Where a person has been appointed as such overseer and has omitted to file in the town clerk's office a notice of his acceptance of the office, cannot be made liable for the statutory penalty. Bentley v. Phelps, 27 Barb. 524. Where a person has been appointed as overseer, and on his refusal to act has paid the penalty imposed by law, he cannot be appointed to fill the vacancy thus created, so as to subject him to a second penalty. Haywood v. Wheeler, 11 Johns. 432.

Other penalties.—Every overseer of highways who shall refuse or neglect either to warn the people assessed to work on highways, to collect the moneys which may arise from fines or commutations, or to perform any of the duties required of him by the Highway Law, or which may be enjoined on him by the commissioners of highways of his town, and for the omission of which a penalty is not otherwise provided, shall, for every such refusal or neglect, forfeit the sum of ten dollars, to be sued for by the commissioners of highways of the town. McFadden v. Kingsbury, 11 Wend. 667; Farman v. Town of Ellington, 46 Hun, 41, aff'd 124 N. Y. 662.

§ 23. Penalties, how collected.—The commissioners of highways shall prosecute, in the name of the town, every overseer of highways, for any penalties known to the commissioners to have

been incurred by the overseer. They shall also upon the complaint of any resident of the town, that any such penalty has been incurred, prosecute such overseer therefor, if satisfied that the complaint is well founded. The costs and expenses incurred by the commissioners in good faith, in such proceedings, shall be a town charge, to be audited by the town board. If the commissioners refuse or neglect to prosecute for any such penalty, for thirty days after such complaint shall have been made, the complainant may prosecute therefor in the name of the town, upon indemnifying the town for the costs and expenses of such prosecution, in such manner as the supervisor may approve. If the commissioners shall neglect or refuse to prosecute for any such penalty, knowing that the same has been incurred, he shall be liable to a penalty of ten dollars for every such neglect or refusal, to be recovered by action, in the name of the town, brought by the supervisor, or by any taxpayer of the town who may indemnify the town, for the costs and expenses of the action, in such manner as the supervisor may approve.

§ 24. Compensation of overseers.—If any overseer shall be employed more days in executing the several duties enjoined upon him by this chapter, than he is assessed to work on the highways, he shall be paid for the excess, at the rate of twelve and a half cents per hour for each day, and be allowed to retain the same out of the money which may come into his hands under this chapter; but he shall not be permitted to commute for the days he is assessed nor be entitled to receive any greater sum as compensation, pursuant to this section, than the amount of money in his hands applicable thereto. (Amended by L. 1899, ch. 78.)

§ 25. Division of town into highway commissioner districts.—When a town has determined upon having three commissioners of highways, the town board may at a regular or special meet-

ing thereof divide the town into three highway commissioner districts, and assign one of such districts to each commissioner of highways. Notice of such division, containing a brief and accurate description of the boundaries of each district and the name of the commissioner assigned thereto, shall be published once a week for two successive weeks in a newspaper published in such town, or if no newspaper be published therein, such notice shall be posted in at least six conspicuous places in such town. After a town is divided, the commissioners shall be elected or appointed, so that at all times one commissioner shall reside in each district. (Added by L. 1898, ch. 127.)

Number of commissioners.—The electors of a town may at a town meeting adopt a proposition for the election of one, two or three commissioners of highways. Town Law, § 15, ante, p. —. A town cannot be divided into districts where it has decided to have but two commissioners under such section. The above section only applies where a town has three commissioners.

The notice of the division of a town into highway commissioner districts may be in the following form:—

FORM NO. 26a.

Notice of Division of Town into Highway Districts.

Notice is hereby given that the undersigned members of the town board of the town of....., county of....., at a special (or regular) meeting of such board held on the.....day of.....19.... have divided such town into (two or) three highway commissioner districts, pursuant to § 25 of the Highway Law.

The boundaries of such districts are as follows:

District No. 1. (Briefly and accurately describe boundaries.)

District No. 2. (Briefly and accurately describe boundaries.)

District No. 3. (Briefly and accurately describe boundaries.)

A. B., highway commissioner, is assigned to district No. 1; C. D., highway commissioner, is assigned to district No. 2; E. F., highway commissioner, is assigned to district No. 3.

Dated....., 19....

R. F., Supervisor.

L. M.,

J. K.,

K. R.,

S. O.,

Justices of the Peace.

§ 26. Duties of commissioner in each district.—When a town is so divided, the commissioners shall apportion to each district

the moneys raised and collected from the town at large for highway purposes and the commissioner assigned to or residing in a district shall expend the money so apportioned to his district upon the highways and bridges situated in or upon the borders thereof. Each commissioner shall cause the highways and bridges in his district to be kept in repair, and shall perform all the duties relating thereto, which the commissioners of highways of the town, except for such division, would perform. His powers and duties as to the supervision, repair, construction and improvements of the highways and bridges within his district shall be exclusive. As to all other powers and duties he shall act in conjunction with the other commissioners. (Added by L. 1898, ch. 127.)

The effect of the above section is to impose upon a commissioner assigned to a highway commissioner district all the powers and duties of a commissioner of highways in a town in respect to the expenditure of the town moneys apportioned to his district in the maintenance and construction of highways and bridges situated therein. In respect to all powers and duties relating to the town generally, each commissioner is required to act with the other commissioners of highways for the whole town.

ARTICLE II.

Assessment for Highway Labor.

- Section 30. Meetings of commissioners.
31. Lists of inhabitants.
32. Non-resident lands.
33. Assessments of highway labor, how made.
34. Copies of lists delivered to overseers.
35. Names omitted.
36. Appeals by non-residents.
37. Credit on private roads.
38. Certain assessments to be separate.
39. Tenant to deduct assessment.
40. Reassessment in case of neglect.
41. Omissions of assessors corrected.
42. New assessments by overseers.
43. Sidewalks and trees.
44. Abatement of tax for shade trees.
45. Sidewalk tax anti-
46. Certificate
47. Trans-
48. Abat-

49. System of taxation defined.
50. Town may change its system.
51. Vote thereon.
52. When change to take effect.
53. Annual tax under money system. Certain villages exempt therefrom.
53a. Duty of highway commissioners in certain towns.
- 53b. State to share expense of maintaining certain county roads.
54. Adoption of county road system.
55. County engineer.
- 55a. Classes of highways; map and survey.
- 55b. Maintenance of improved highways.
- 55c. Rules and regulations to be observed by commissioners of highways.
- 55d. When county may be compelled to appoint county engineer.
56. Apportionment of expenditures for county roads.
57. Bonding county for county roads.
58. Jurisdiction of county roads. Money system to prevail in towns of a county adopting county road system.
- 59a. Surplus of proceeds of county bonds.

§ 30. Meetings of commissioners.—The commissioners of highways of each town shall meet within eighteen days after the annual town-meeting, at the town clerk's office, on such day as they shall agree upon, and afterwards at such other times and places as they shall think proper.

Quorum at meetings.—Whenever there are three commissioners of highways elected in a town, a majority of them constitute a quorum for the transaction of business. Statutory Construction Law, § 19, see ante, p. 20.

Time of meeting.—The provision of the above section that the commissioners shall meet eighteen days after the annual town meeting contemplates a meeting of the commissioners at least once in each year. The holding of town meetings biennially instead of annually did not probably change the requirement that commissioners should meet annually. It would seem proper that the annual meeting of the commissioners should be held at some time within eighteen days after a biennial town meeting, and at a corresponding time in each alternate year. Under subdivision five of section four of the Highway Law, ante, p. 28, the commissioners are required to make and file with the town clerk a written appointment of overseers of highways on the fifteenth day of April of each year, and if there are two or more commissioners of highways in a town it is probable that they will meet on such day for such purpose.

§ 31. Lists of inhabitants.—Each of the overseers of highways shall deliver to the clerk of the town, within sixteen days after his appointment, a list subscribed by him, of the names of all the inhabitants in his highway district, who are liable to work on the highways; and the town clerk shall deliver such lists to the commissioners of highways.

Persons taxable.—As to who are liable to be assessed for highway labor, see § 33, sub. 2, post, p. 91. The above section, of course, only applies to towns which still retain the labor system of working the highways.

Delivery of list.—The provisions of the above section requiring the delivery of a list of taxable inhabitants in his district by the overseer is directory. His omission to deliver such list will not invalidate an assessment made against persons liable for highway labor by the commissioners of highways. Such lists are not furnished for any other purpose than to indicate the persons, "who are liable to work on the highways." Rinehart v. Young, 2 Lans. 354.

§ 32. Non-resident lands.—The commissioners of highways in each town, before making the assessment of highway labor, shall make out a list and statement, of the contents of all unoccupied lots, pieces or parcels of land within the town, owned by non-residents; every lot so designated, shall be described in the same manner as is required from assessors, and its value shall be set down opposite to the description; such value shall be the same as was affixed to the lot in the last assessment-roll of the town; and if such lot was not separately valued in such roll, then in proportion to the valuation which shall have been affixed to the whole tract, of which such lot shall be a part.

Non-resident lands are defined to be unoccupied lands not owned by a person residing in the town or ward in which the same are situated. Hampton v. Hamsher, 46 Hun, 144, aff'd 124 N. Y. 63.

Description of non-resident lands.—The law provides that non-resident lands shall not be described in the same manner as is

required from assessors. Section 29 of the Tax Law provides for the designation of real property of non-residents by assessors in an assessment roll. Such section provides that: "The real property of non-residents of the tax districts shall be designated in a separate part of the assessment roll, and if it be a tract subdivided into lots or parts of a tract so subdivided, the assessors shall:—1. Designate it by its name, if known by one, or if not distinguished by a name or the name is unknown, state by what lands it is bounded. 2. Place in the first column the numbers of all unoccupied lots of any subdivided tract, without the names of the owner, beginning at the lowest number and proceeding in numerical order to the highest, but the entry of the name of the owner shall not affect the validity of the assessment. 3. In the second column and opposite the number of each lot, the quantity of land therein. 4. In the third column and opposite the quantity the full value thereof. 5. If it be a part of a lot, the part must be distinguished by boundaries or in some other way by which it may be identified. If any such real property be a tract not subdivided, or whose subdivisions cannot be ascertained by the assessors, they shall certify in the roll that such tract is not subdivided, or that they cannot obtain correct information of the subdivisions, and shall set down in the proper column the quantity and valuation as herein directed. If the quantity to be assessed is part only of a tract, that part, or the part not liable must be particularly described."

Non-resident lands are subject to assessment for highway purposes to the same extent as other property. Chamberlain v. Tay-Taylor, 36 Hun, 24. Where non-resident lands are occupied by a tenant who is a resident of the town, the assessment is made against the occupant in the same manner as resident land. If such lands are unoccupied the assessment is made against the land itself. Ensign v. Barse, 107 N. Y. 329.

The form of an assessment of non-resident land may be as follows:—

FORM NO. 27.

Highway Commissioners' List of Non-resident Lands.

(Highway Law, § 32, ante p.).

The following is a list and statement of the contents of all lots, pieces or parcels of land within the town of....., in the county....., owned by non-residents therein, made by the under-med, commissioners of highways of said town:

NAME OF TRACT OR PATENT.	Number lot.	Part	Number section.	Township	Number range.	Number acres.	Valua- tion.

Dated this.....day of....., 19.....

A. E.,
C. D.,
E. F.,
Commissioners of Highways.

§ 33. Assessments of highway labor, how made.—The commissioners of highways shall, at their first or some subsequent meeting, ascertain, assess and apportion the highway labor to be performed in their town, in the then ensuing year, as follows:

1. The whole number of days work to be assessed in each year, shall be ascertained, and shall be at least three times the number of taxable inhabitants in the town.

2. Every male inhabitant being above the age of twenty-one years excepting all honorably discharged soldiers and sailors who lost an arm or a leg in the military or naval service of the United States, or who are unable to perform manual labor by reason of injuries received, or disabilities incurred in such service, members of any fire company formed or created pursuant to any statute and situated within such town, persons seventy years of age, clergymen and priests of every denomination, paupers, idiots and lunatics shall be assessed at least one day. (Amended by L. 1898, ch. 353, and L. 1903, ch. 172.)

3. The residue of such days work, shall be apportioned and assessed upon the estate, real and personal, of every inhabitant of the town, including corporations liable to taxation therein, as the same shall appear by the last assessment-roll of the town, and upon each tract or parcel of land owned by non-residents of the town contained in the list made by the commissioners,

excepting such as are occupied by an inhabitant of the town, which shall be assessed to the occupant. The assessment of labor for personal property, must be in the district in which the owner resides, and real property in the district where it is situated, except that the assessment of labor upon the property of corporations, may be in any district or districts of the town, and such labor may be worked out or commuted for, as if the corporation were an inhabitant of the district; but the real property within an incorporated village or city, exempted from the jurisdiction of the commissioners of highways of the town, and personal property of an inhabitant thereof, shall not be assessed for highway labor by the commissioners of highways of the town. Whenever the assessors of any town shall have omitted to assess any inhabitant, corporation or property therein, the commissioners of highways shall assess the same, and apportion the highway labor as above provided.

4. The commissioners shall affix to the name of each person named in the lists furnished by the overseers, and of assessable corporations, and to the description of each tract or parcel of land contained in the list prepared by them of non-resident lands, the number of days which such person or tract shall be assessed for highway labor, as herein directed, and the commissioners shall subscribe such lists, and file them with the town clerk.

5. If the commissioners of highways shall neglect for one year, after any highway shall have been laid out, and title thereto acquired, to open or work the same, or any part thereof, and any inhabitant or corporation of the town, in or through which the highway runs, shall give ten days' notice to the commissioners of the town, that they desire to apply the whole or any part of their highway labor to the working of such highway, the commissioners shall assign such inhabitants and corporations to such highway district, direct the highway labor for

which they are annually assessed to be applied to the same, and cause the same to be worked and put in good order for vehicles and travelers within one year, under the direction of any of such inhabitants, whom such commissioners may appoint as an overseer of the labor so to be applied to such highway; and when the number of days' labor assessed in the current year to such inhabitants, as the annual highway tax, is not sufficient to put such highway in good order, the inhabitants and corporations may anticipate the whole or any part of the highway labor assessed, and to be assessed against them, for a period not exceeding three years, but from no one of the districts of the town shall more than one-half of its annual labor be taxed and applied to any highway not embraced in such district.

Assessments, how made in general.—The overseers of highways are required by § 31 of the Highway Law (*ante*, p. 89) to make out and deliver to the commissioners of highways a list of the inhabitants in their districts, who are liable to work on the highways therein. The commissioners are then required to assess at least one days labor upon each male inhabitant, except those specified in subdivision two of the above section. The whole number of days of labor to be assessed must be sufficient to properly maintain the highways of the town and shall be determined and apportioned by the commissioners, but must be at least three times the number of the taxable inhabitants of the town. After deducting the number of days assessed upon the male inhabitants of the town, the remainder must be apportioned and assessed upon the real and personal property of every inhabitant of the town, including corporations liable to taxation therein, as the same shall appear upon the last assessment-roll of the town.

Assessment-roll of town.—The last assessment-roll of the town is to be made the basis of the commissioners' apportionment of highway labor. The commissioners are required to follow such assessment-roll in determining the amount of labor to be assessed to each resident of the town even though it includes and excludes lands lying partly in one and partly in another town. *Hampton v. Hamsler*, 46 Hun, 144, aff'd 124 N. Y. 634; *People ex rel. Hudson River R. Co. v. Pierce*, 31 Barb. 138; and in assessing the residue of highway labor upon the real and per-

sonal property of every inhabitant appearing upon the last town assessment-roll, they have no discretionary power to make corrections therein. *Trustees of Angelica v. Morse*, 56 Barb. 380.

Assessment upon corporations.—Under the old revised statutes which contained no provision for the assessment of corporations for highway labor it was held that a corporation was not a person within the meaning thereof; and that the assessment for highway labor being for a personal service could not be imposed upon a corporation. *Bank of Ithaca v. King*, 12 Wend. 390. But as the law now stands corporations are expressly taxable for highway labor. All corporations appearing upon the last town assessment-roll are taxable for highway purposes, and the commissioners must be guided by such roll in determining the corporation to be assessed; they have no discretionary power in respect thereto. *People ex rel. Hudson River R. Co. v. Pierce*, 31 Barb. 138. The assessment of labor on the property of corporations may be in any district or districts of the town, and such labor may be worked out or commuted for as if the corporation were a resident of the district. Thus the buildings and plant of a corporation may be in one district, but the commissioners may assess the labor of the corporation in any other district or in several districts. Under § 62 of the Highway Law, post, p. 133, corporations in a great many counties are authorized to pay their commutation money to the commissioners who are to expend such money upon the highways and bridges of the town as may be directed by the town board.

The courts have sustained the power conferred upon commissioners of highways to assess a corporation having property in the town for highway labor to be performed in districts in such town other than that in which such property is situated. *N. Y. L. E. & W. R. R. Co. v. Supervisors of Delaware*, 6 How. Pr. 5.

Non-resident lands, if unoccupied, are to be assessed to the non-resident owners, as directed and provided in § 32, ante, but if such lands are occupied they are to be assessed to the occupant. The statute provides in effect that the lands of a non-resident occupied by a non-resident's tenant, servant or agent shall be assessed in the same manner as resident lands. *Eusign v. Barse*, 107 N. Y. 329. Where a tenant is assessed for highway labor he may deduct the amount thereof from the rent due or to become due. Highway Law, § 39, post, p. 101.

The validity of an assessment for highway labor does not depend upon the validity of the last assessment-roll of the town, since the commissioners of highways have no discretion in making their assessment and cannot omit any real or personal prop-

erty appearing upon the assessment-roll. Trustees, etc. v. Morse, 56 Barb. 380. A commissioner of highways is not liable for the value of days labor as set against a resident of the town in conformity with the facts appearing upon the last assessment-roll, although the tax assessment was erroneous through a mistake of the assessors in proceeding under a repealed statute relating to lands lying in two towns. Hampton v. Hamsher, 142 N. Y. 634.

Separate valuations to be made by assessors of lands partly within city or village; assessments to be made by commissioners on lands without city or village.—In all cases where there is an incorporated village or city within the limits of any town, which is by law a separate road district, and there shall be any real estate, owned by any person or corporation, situated partly within the limits of such village or city and partly without said village or city, it shall be the duty of the assessors of such town, after fixing the valuation of the whole of such real estate as now by law required, to determine what proportion of such valuation is on account of that part of said real estate lying without the limits of said city or village, and designate the same upon their assessment-list. (L. 1871, ch. 171, § 1.)

The valuation of the real estate lying without the limits of any city or village, so fixed and determined by the assessor, shall be the valuation on which the commissioners of highways of towns shall assess highway labor against the owner or owners of such real estate; and in no case shall the commissioners of highways assess any highway labor on property situated within the limits of any incorporated city or village which is by law a separate road district. (Idem, § 2.)

Highways on the division lines of a town or village or city; allotment of portion to be worked by each.—Whenever a highway, street or road shall be on the line between a city, town or village, or between either of them, the officers authorized and required to repair and keep in order the highways, streets and roads in such city, town and village, shall meet together at the mayor's office in such city, if said highway, street or road be on the line between a city and town or a city and village, or at the office of the town clerk of such town, if the same be on the line between a town and village, on the first Monday of May in each year, at 12 o'clock M., and divide such highway, street or road, and allot one part thereof to such city and the other to such town or village, as the case may be, in such manner that the labor and expense of working and keeping in repair such highway, street or road may be equal as near as may be. (L. 1870, ch. 311, § 1.)

Upon the neglect or failure to attend on the part of the officers of any city, town or village, at the time or places designated in the first section of this act for the purposes therein mentioned, the officers of the city, town or village present may perform the said duty, and when done, the divisions thus made shall be of the same force and effect as if made by the joint action of such city and town, or such city and village, or such town and village. (Idem, § 2.)

The statement of the division made pursuant to the provisions of the first or second section of this act shall be reduced to writing and properly authenticated by the officers making the same, and shall be filed within ten days after such division is made in the offices of the city clerk of the city, of the town clerk of the town, and of the clerk of the village, between whom such division has been made. (Idem, § 3.)

Streets on boundary lines between villages and town.—L. 1870, ch. 311, is repealed so far as it relates to the division of streets on boundary lines between villages and other municipal corporations by Village Law, § 342. The following section of the Village Law applies to streets on boundary lines between villages and towns:—

Whenever a street is on a line between two villages, or between a village and a city or town, the highway or street commissioners of such adjoining municipalities shall, on or before the first day of May in each year, meet at a time and place to be determined by them, and divide such street. The officers present at such meeting shall allot a part of the street to each municipality in such manner that the labor and expense of keeping such street in repair may be equal as nearly as practicable. The officers making such division shall, within ten days thereafter, file in the office of the clerk of each municipality a certificate showing the part of such street allotted to each. (Village Law, § 160.)

The road warrants containing the list of inhabitants and corporations assessed for highway labor in the several highway districts, and directions to the overseers as to the performance of their duties are published in blank by publishers of law blanks and are usually in form following:—

FORM NO. 28.

Road Warrant.

To..... overseer of highways in District No..... of the town of....., county of....., state of New York, which begins at..... and ends at.....

The undersigned, commissioners of highways of said town, having ascertained, assessed and apportioned the highway labor to be per-

formed in said town, and having affixed the number of days' labor as so apportioned to the lists of persons, corporations and non-resident lands in your district, as set forth in the following schedule.

1. The inhabitants and corporations of said town assigned to said highway district are assessed as follows:

Names of Owners.	Days Assessed.
A. B.	6
J. K.	9
D. C. Corporation,	16

You will therefore give the several persons and corporations, whose names are hereunto annexed, notice as required by sections 60 and 61 of the Highway Law, to work on the highways of your district the number of days set opposite their names, or commute therefor at the rate of one dollar per day; two-thirds to be performed by the first day ofnext, and the residue by the first day ofnext. (And also to cause all the loose stones, lying on the beaten track of every highway within your district, to be removed once in every month, from the first day of April until the first day of December.) Stones so removed shall not be thrown into the gutter, nor into the grass adjoining such highways, but they shall be conveyed to some place from which they will not work back, or be brought back into the track by the use of road machines or other implements used in repairing the highways. (§ 20, subd. 5.) No stone or other rubbish shall be drawn to and deposited within the limits of any highway, except for the purpose of filling in a depression or otherwise improving the highway, with the consent of the commissioner of highways, and under the direction of a commissioner or overseer of highways. (§ 165.)

Should any name in your district be omitted, or new inhabitants move in, you are to add their names and assess them in proportion to their real and personal estate to work on the highways as others are assessed by the commissioner in the above list. (§ 35.) Every person or corporation assessed to work on the highways, and warned, who does not commute therefor, shall appear in person, or by an able-bodied man as a substitute. A day's labor is eight hours of work, and every person or corporation assessed more than one day shall be allowed to work ten hours in each day. (§ 64.)

Whenever the labor in your district has been worked out, commuted for or returned to the supervisor, and the highways are obstructed by snow or otherwise, and written notice has been given to you by any two or more inhabitants of your town, liable to the payment of highway tax, requiring the removal of such obstruction, it shall be your duty as such overseer, and you are required immediately to call upon all persons and corporations, liable to highway tax therein, to assist in removing such obstructions; and such labor, so called for by you, shall be assessed upon those liable to perform the same, in proportion to their original assessments; and if the persons so called out by you, do not appear at the place designated by you, or do not commute at \$1.00 a day within twenty-four hours after due notice, you will cause such obstructions to be immediately removed and return to us a list of the persons who have so failed to appear or commute, charging each person for each day the sum of one dollar and fifty cents, as printed in section 21 of the Highway Law.

You are also required to cause all noxious weeds within the bounds of the highways in your district to be cut down or destroyed twice in each year, once before the first day of July, and again before the first day of September (§ 20, subd. 3); and to give written notice to any occupant of premises within your district to cut all weeds, briars and brush growing within the bounds of the highway, between the fifteenth day of June and the first day of July, and between the fifteenth day of August and the first day of September; and if such occupant shall not cut such

weeds, briers and brush, as so required, within ten days after receiving such notice, you shall employ some one to do such work, and make a report under oath to the commissioner.. of highways of the amount expended by you thereon, and the ownership and occupancy of the several parcels of land against which the labor was performed, on or before the first day of November next. (§ 70, 71.)

You are required by law, on or before the first day of September, (unless some other time is prescribed by the board of supervisors), to make out and deliver to the commissioner.. of highways of your town a list of all persons and corporations who have not worked out or commuted for their highway assessment, with the number of days not worked or commuted for by each, charging for the same at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and persons unknown, which were assessed on your warrant by the commissioner.. of highways, or added by you, according to law, on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day, which list shall be accompanied by your affidavit as overseer, that you have given the notice required by law to appear and work, and that the labor specified in the list returned has not been performed or commuted. (§ 66.)

And at the same time you are to render to one of the commissioners of highways of your town an account in writing, verified by your oath, and containing:

First. The names of all persons assessed to work on the highways in the district of which you are overseer.

Second. The names of all those who have actually worked, and the number of days they have so worked.

Third. The names of all those from whom penalties have been collected, and the amounts thereof.

Fourth. The names of all those who have commuted, and the manner in which the moneys arising from penalties and commutations have been expended by you.

Fifth. A list of all persons whose names you have returned as having neglected or refused to work out their several highway assessments, with the number of days and amount of tax so returned for each person, together with a list of all lands which you have returned for non-payment of taxes, and the amount of tax on each tract of land so returned—according to the statute in such case made and provided.

And you are then and there to pay over to said commissioner.. all the moneys remaining in your hands unexpended. The law imposes a penalty of ten dollars on the overseer for every neglect or refusal to render such account, or to pay over said moneys, which fine the commissioner.. bound to enforce in every case in which no return is made, or such delinquency occurs. (§ 69.)

Given under hand.., this.....day of....., 190..

.....
.....
.....
Commissioners of Highways.

§ 34. Copies of list delivered to overseers.—The commissioners of highways shall direct the clerk of the town to make copies of such lists, and shall subscribe such copies, after which they shall cause the several copies to be delivered to the respective overseers of highways of the several districts in which the high-

way labor is assessed, and the acceptance of the list by any overseer to whom the same may be delivered, shall be deemed conclusive evidence of his acceptance of the office of overseer.

Copies of such lists go to the overseers of highways, whose districts include the lands, and in default of being worked out or paid, the overseers are required to deliver a list of persons in default to the commissioners of highways, who certify the same to the town board, and the town board is required to certify the amount of the arrearages to the board of supervisors, who are to cause such amount to be levied against the property assessed. See Highway Law, §§ 66, 67; *Coleman v. Shattuck*, 2 Hun, 499, aff'd 62 N. Y. 348.

§ 35. Names omitted.—The names of persons or corporations omitted from any such list, and of new inhabitants, shall from time to time be added to the several lists, and they shall be assessed by the overseers in proportion to their real and personal estate to work on the highways as others assessed by the commissioners on such lists, subject to an appeal to the commissioners of highways.

Names to be added.—Where one owns lands in the same town in which he resides, but in another road district, and moves his residence thereto without having been assessed thereon for highway labor, he is not a new inhabitant within the meaning of the above section. But such a person may be regarded as having been "omitted from any such list," and his name may be added. *Rinehart v. Young*, 2 Lans. 354.

§ 36. Appeals by non-residents.—Whenever any non-resident owner of unoccupied lands shall conceive himself aggrieved by any assessment of any commissioner of highways, such owner, or his agent, may, within thirty days after such assessment, appeal to the county judge of the county in which such land is situated, who shall, within twenty days thereafter, hear and decide such appeal, the owner or agent giving notice to the commissioners of highways of the time of the hearing before the judge, and his decision thereupon shall be final and conclusive.

Appeals of non-residents to the county court and notices of such appeals to commissioners may be in the following form:—

FORM NO. 29.

Appeal by Non-resident from Assessment for Highway Labor.

COUNTY COURT—County of Albany.

In the Matter of the Assessment of highway labor of L M, a non-resident owner of unoccupied lands in the town of.....	}
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L. M., a non-resident owner of unoccupied lands in the town of....., county of....., considering (or T. W., agent of L. M., a non-resident owner of lands in said town, who considers) himself aggrieved in the assessment for highway labor by the commissioners of highways of said town, upon the following described lands, to wit: (Here describe them as in the list made by the commissioners) does hereby appeal from the assessment of said commissioners to the county judge of said county.

Dated this.....day of....., 19....

FORM NO. 30.

Notice of Appeal.

To A. B., C. D., E. F., Commissioners of Highways of the Town of.....
 You are hereby notified that, considering myself aggrieved by your assessment for highway labor of the land owned by me in said town, I have this day appealed to the county judge of the county of....., who will on the.....day of....., at.... o'clock in the.....noon, at....., in the village of....., hear and decide on said appeal.

Dated this.....day of....., 19....

L. M.

§ 37. Credit on private roads.—The commissioners of highways of each town shall credit to such persons as live on private roads and work the same, so much on account of their assessments as the commissioners may deem necessary to work such private road, or shall annex the private roads to some of the highway districts.

See *In re Howland's Bridge*, 14 N. Y. Supp. 845.

§ 38. Certain assessments to be separate.—Whenever the commissioners of highways shall assess the occupant, for any land not owned by such occupant, they shall distinguish in their as-

essment lists, the amount charged upon such land, from the personal tax, if any, of the occupant thereof; but when any such land shall be assessed in the name of the occupant, the owner thereof shall not be assessed during the same year to work on the highways, on account of the same land.

§ 39. Tenant to deduct assessment.—Whenever any tenant of any land for a less term than twenty-five years, shall be assessed to work on the highways for such land, and shall actually perform such work, or commute therefor, he shall be entitled to a deduction from the rent due, or to become due from him for such land, equal to the full amount of such assessment, estimating the same at the rate of one dollar per day, unless otherwise provided for by agreement between the tenant and his landlord.

§ 40. Reassessment in case of neglect.—If it shall appear from the annual return of any overseer of highways, that any person or corporation who was assessed to work on the highways (other than non-residents), has neglected to work the whole number of days assessed, and has not commuted for, or otherwise satisfied such deficiency, the commissioners of highways shall reassess the deficiency to the person so delinquent, at the next assessment for work for highway purposes, and add it to his annual assessment; such reassessment shall not exonerate any overseer of highways from any penalty which he may have incurred under the provisions of this chapter.

§ 41. Omissions of assessors corrected.—Whenever the assessors of any town shall have omitted to assess any inhabitant or property in their town, the commissioners of highways shall assess the persons and property so omitted, and shall apportion highway labor upon such persons or property, in the same manner as if they had been duly assessed upon the last assessment-roll.

§ 42. New assessments by overseers.—When the quantity of labor assessed on the inhabitants of any district by the commissioners of highways, shall be deemed insufficient by the overseer of the district to keep the highways therein in repair, such overseer shall make another assessment on the actual residents of the district, in the same proportion, as near as may be, and not exceeding one-third of the number of days assessed in the same year by the commissioners, on the inhabitants of the district; and the labor so assessed by an overseer, shall be performed or commuted for in like manner, as if the same had been assessed by commissioners of highways.

Making new assessment.—Whenever an assessment of highway labor made by a commissioner of highways is insufficient to keep the road in the district in repair, this section authorizes the overseer to make a further assessment on the residents of his district, not exceeding one-third the number of days labor assessed in the original assessment. See Farman v. Town of Ellington, 46 Hun, 41, aff'd 124 N. Y. 662; Weed v. Village of Ballston, 76 N. Y. 329.

A new assessment by an overseer of highways may be in the following form:—

FORM NO. 31.

New Assessment by Overseer of Highways.

The amount of labor assessed on the inhabitants of highway district No....., town of....., being deemed by me, the undersigned overseer of highways in said district, insufficient to keep the highways therein in repair, I do therefore, pursuant to section 42 of the Highway Law, make a further assessment as follows:

NAMES.	Days.	NAMES.	Days.
J D.	7	T W.	8
R S.	9	B R.	4

Dated this..... day of....., 19.....

L. M.,
Overseer of Highways, District No....

§ 43. Sidewalks and trees.—The commissioners of highways may, by an order in writing duly certified by a majority of them, authorize the owners of property adjoining the highways, at their own expense, to locate and plant trees, and locate and construct sidewalks along the highways in conformity with the topography thereof, which order, with a map or diagram showing the location of the sidewalk and tree planting, certified by the commissioners, shall be filed in the office of the clerk of the town where the highway is located, within ten days after the making of the order.

Sidewalks in highways.—Sidewalks constructed along highways under authority of statute, either by the adjoining owners or by highway officers, are a part of the highway. *Clapper v. Town of Waterford*, 131 N. Y. 382; *Village of Fulton v. Tucker*, 3 Hun, 529. Sidewalks for the most part are constructed in what are known as unincorporated villages. When so constructed the same liability for defects therein exists as in the case of sidewalks in incorporated villages. The controlling principles in the case of sidewalks in villages is stated in the case of *Saulsbury v. Village of Ithaca*, 94 N. Y. 27, where it is said:—"It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets, is a matter of discretion not to be regulated by the courts; yet when a sidewalk is built with or without its permission, it becomes responsible for its condition, and is bound so long as it exists, to keep it in order." So in the case of *Birngrubber v. Town of Eastchester*, 54 App. Div. 80, the court held where a town constructs a highway with a sidewalk for the use of the inhabitants of an unincorporated village, the duty to keep the sidewalk in proper order for travel applies to the same extent as to the center of the street. And in the case of *Village of Fulton v. Tucker*, 3 Hun, 529, it was held that when a person is injured in consequence of a sidewalk being out of repair, no action can be maintained against the owner of the adjacent premises, to recover damages therefor, unless the duty of keeping the sidewalk in repair has been imposed upon such owner by some statute or contract; sidewalks are a part of the highway, and the owner of the adjoining land has no greater duty in regard to keeping them in repair, than he has in regard to any other part of the highway.

Penal Code, § 652, provides that: "A person who willfully and without authority or necessity drives any team, vehicle, cattle, sheep, horse, swine or other animal along upon a sidewalk is punishable by a fine of \$50, or imprisonment in the county jail not exceeding 30 days, or both."

Shade trees.—Trees generally which stand upon land over which a highway is laid out are for the proper use of the owner or occupant of the adjoining land, see Highway Law, § 156, post.

The owners of adjoining lands are especially authorized by this section to plant shade trees along highways, or to otherwise improve or beautify the lands in the highways adjacent to their premises, provided there is no interference with the use of such highways. *Palmer v. Larchmont Electric Co.* 6 App. Div. 12 (Rev'd on other grounds, 158 N. Y. 231).

Where shade trees are so set out the owner of the adjoining premises is entitled to have such trees protected against negligent or willful destruction at the hands of third parties, even though he does not own the fee of the highway. *Lane v. Lamke*, 53 App. Div. 395. See also *Edsall v. Howell*, 86 Hun. 424.

The right to the protection of shade trees vested in the owners of adjoining lands is subservient to the proper and legitimate use of the highway by the public. So where an electric light company, organized pursuant to the Transportation Corporation Law, has secured the consent of the proper authorities for the erection of its poles and the stringing of its wires, such owners cannot complain if the company in the reasonable exercise of its legitimate powers trims or injures such trees. *Farmer v. Larchmont Electric Co.* 158 N. Y. 231. The question as to whether or not the use of public highways in the country by electric lightning corporations is within the proper public use of such highways is in all cases determined by the necessity of the light for the proper use of such highways. *Idem.*

Where an abutting owner is entitled to the fee of the street to its center, he has the right to prevent the removal of trees, if such removal would work an irreparable injury to his premises, unless such trees have become detrimental and destructive to the highway, or interfere with its full use by the public. *Evans v. Street Commissioners of Hudson*, 84 Hun, 206.

Where the owner of adjoining premises owns the land upon which the highway is situated, such owner may remove the trees standing on such highway, notwithstanding statutes or municipal ordinances forbidding any person to injure shade trees on the highway. *Village of Lancaster v. Richardson*, 4 Lans. 136.

Willful injury of shade trees.—A person who willfully cuts down, girdles, or otherwise injures a fruit, shade or ornamental tree standing on the lands of another, or the people of the state, is guilty of a misdemeanor. Penal Code, § 640, sub. 2.

L. 1875, ch. 215, as amended by L. 1881, ch. 344, reads as follows:—

“§ 1. It shall be unlawful for any person or persons whatsoever, in this state, to hitch any horse or other animal to, or leave the same standing near enough to, to injure any fruit or forest tree that has been transplanted or used as a shade or ornamental tree around any school house, church or public building, or along any public highway, or to cut down or mutilate, in any way, any such ornamental or shade trees; but the right of property owners along highways to cultivate, train and use such shade trees shall not be impaired or abridged hereby.

§ 2. Any person or persons guilty of violating the provisions of section one of this act shall be liable to prosecution by any person, before any justice of the peace in the town where the offense is committed, and punishable by a fine not exceeding ten dollars, nor less than one dollar, besides the costs of action for each offense or for each tree cut down or mutilated in violation of the provisions of this act; and every such penalty, when collected, shall be paid by the justice, one-half to the overseer of the poor of the town in which recovery was had, and the remainder to complainant, and the same process and means for the collection of the penalties imposed by this act may be issued and had as are now allowed by law for the collection of damages in actions of tort, but no provision of this act shall operate to interfere with any ordinance of the incorporation of villages and cities of this state, intended to secure the protection of shade trees therein.”

The order of the commissioners permitting the planting of trees or the construction of sidewalks along highways may be in the following form:—

FORM NO. 32.

Order Permitting Planting of Trees or Construction of Sidewalks.

County of }
Town of } ss.:

We, the undersigned, commissioners of highways of said town, do hereby authorize L. M., at his own expense, to locate and plant trees (or locate and construct sidewalks) along the highway adjoining his premises, in highway district No. in said town, according to a map or diagram hereto attached and made a part of this order.

Dated this day of 19.....

A. B.
C. D.
E. F.

Commissioners of Highways.

(Map or Diagram Showing Location of Sidewalk and Tree Planting.)
Here make a diagram showing location of trees to be planted or sidewalk to be laid.

A. B.
C. D.
E. F.

Commissioners of Highways.

Dated this..... day of....., 19....

§ 44. Abatement of tax for shade trees.—Any inhabitant liable to highway tax, who shall hereafter, pursuant to such an order, transplant by the side of the highway adjoining his premises, any forest shade trees, fruit trees, or any nut bearing trees, suitable for shade trees, shall be allowed by the overseers of highways, or other officer having charge of the highway, in abatement of his highway tax, one dollar for every four trees set out; but all trees must have been set out the year previous to such allowance, and be living and well protected from animals at the time of the allowance, and not further than eight feet from the outside line of any highway three rods wide, and not more than one additional foot further therefrom, for each additional rod in width of highway, and not less than seventy feet apart, on the same side of the highway, if elms, or fifty feet, if other trees; trees transplanted by the side of the highway, in place of trees which have died, shall be allowed for in the same manner. Such abatement of highway tax to any person, shall not exceed one-quarter of his annual highway tax in any one year; but such abatement shall be allowed by the overseers of highways, or other officers having charge of the highway, annually, until it shall have equalled the whole number of trees set out, at the rate herein specified.

§ 45. Sidewalk tax anticipated in towns under labor system; sidewalks in towns under money system.—The commissioners of highways of any town, may, upon the written application of

a majority of the inhabitants in any highway district, subject to assessment for highway labor therein, authorize not more than one-quarter of the highway labor of the district, or of the commutation money received therefor, to be expended under the direction of the overseer of highways of the district, in the construction, repairs and improvement of any sidewalks within the limits of the district, and may by writing signed by them, filed with the town clerk, authorize not more than one-fourth of the highway labor of the district, to be anticipated for not more than three years, for constructing, improving or repairing any such sidewalk; and thereupon any person or corporation, assessed for highway labor in the district, may, for such purpose, anticipate his or its assessment for highway labor for the term prescribed by the commissioners, and may perform such labor, under the direction of the overseer within such time, or commute therefor. The commissioner of highways of any town which has adopted the money system of taxation for improving its highways may with the consent of the town board, expend a portion of the money raised for the maintenance of its highways in maintaining and repairing existing sidewalks in such town. The town board of any such town may on the petition of not less than twenty-five taxpayers of the town, by resolution, direct the commissioner of highways to construct a sidewalk along a described portion of any highway of the town, in a manner and not exceeding an expense to be specified in the resolution, and the expense of constructing such sidewalk shall be a town charge, and assessed and levied in the same manner as money raised for the maintenance of highways in such town. (Amended by L. 1904, chap. 688).

The application to expend a portion of the highway labor upon the construction of sidewalks, and the authority granted by the commissioners to make such expenditure may be in the following form:—

FORM NO. 33.

Application to Expend Money on Sidewalks.

To the Commissioners of Highways of the Town of.....
County of.....

We, the undersigned, a majority of the inhabitants of highway district No....., in the said town of....., subject to assessment for highway labor therein, hereby make application and request that you authorize the expenditure of (not more than one-quarter) of the highway labor or commutation money of said district to the construction, improvement and repairs of the sidewalks in said district for the term of (not exceeding three) years pursuant to section 45 of the Highway Law.

Dated this.....day of....., 19....

L. M.
R. S.
T. W.

FORM NO. 34.

Grant of Authority.

County of
Town of } ss.:

We, the undersigned commissioners of highways of said town, hereby authorize the overseer of highway district No....., in said town, to anticipate and expend (not exceeding one-quarter) of the highway labor or commutation money received therefor, in said district, for the term of (not exceeding three) years, in the construction, improvement and repair of the sidewalk within the limits of said district, pursuant to section 45 and 46 of the Highway Law.

Dated this.....day of....., 19....

A. B.,
C. D.,
E. F.,

Commissioners of Highways.

§ 46. Certificate of anticipation.—The overseer shall give to such person or corporation, upon the performance of such labor or commutation therefor, a certificate signed by him, showing the number of days' labor so anticipated and worked, or commuted for by such person or corporation; and in each succeeding year, upon presentation of such certificate, the person or corporation shall be credited and allowed by the overseer of highways with the performance of the number of days' labor assessed for such year, until the credit shall equal the number of days stated in the certificate to have been anticipated, and shall indorse thereon a statement signed by him, showing the credit and allowance.

The certificate of anticipation of highway labor may be in the following form:—

FORM NO. 35.

Certificate of Anticipation.

County of } ss.:
Town of

I, the undersigned, overseer of highway district No..... in the said town of....., hereby certify that R. S. has anticipated and worked (or commuted for)....days, for the purpose of constructing, improving and repairing the sidewalk within the limits of said district, pursuant to section 45 of the Highway Law.

Dated this.....day of....., 19....

L. M.,

Overseer of Highway District No.....

§ 47. Transfer of certificate.—Such certificate may be transferred to any grantee, upon a voluntary grant of the real property upon which such highway labor is assessable, and if such real property is transferred otherwise than by voluntary grant, it shall be deemed to have been transferred to the person succeeding thereto, and in the hands of any such transferee, it shall have the same effect as when held by the original owner.

If the owner of the premises upon which the highway labor assessed was anticipated transfers such premises by voluntary grant, there should be indorsed upon the certificate an assignment in the following form:—

FORM NO. 36.

Indorsement in Case of Transfer.

For value received, I hereby assign and transfer all my rights and interest in and to the within certificate of anticipation to J. B., grantee of the real property upon which such highway labor is assessable.

Dated this.....day of....., 19....

R. S.

If the premises are involuntarily sold as for instance pursuant to the judgment of a court, the certificate is deemed, under the above section to pass to the transferee.

§ 48. Abatement of tax for watering trough.—The commissioners of highways shall annually abate three dollars from the highway tax of any inhabitant of a highway district, who shall

construct on his own land therein, and keep in repair a watering trough beside the public highway, well supplied with fresh water, the surface of which shall be two or more feet above the level of the ground, and easily accessible for horses with vehicles; but the number of such watering troughs in the district, and their location, shall be designated by the commissioners. In a town in which the highways are worked or repaired by the money system of taxation, the commissioners of highways shall annually issue to each person to whom such an abatement is allowed, a certificate specifying the amount thereof. (Amended by L. 1897, ch. 227.)

Abatement of toll for watering trough.—Where a watering trough is constructed and maintained by an owner of premises along a turnpike or plank road, the company owning such plank road or turnpike must abate the toll of such owner in the annual sum of \$3. The commissioners of highways of the town, in which such watering trough is constructed, must designate the watering troughs along such plank road or turnpike necessary for public convenience. See L. 1869, chap. 131, post.

The certificate of abatement of highway tax on account of the construction and maintenance of watering-troughs may be in the following form:—

FORM NO. 37.

Certificate of Abatement.

County of
Town of } ss.:

This is to certify that J. D., residing in highway district No....., in the town of....., has constructed and maintained on his own land in such district a watering trough, in accordance with section 48 of the Highway Law, and that because thereof he is entitled to an abatement of his highway taxes in such district in the sum of three (3) dollars, which amount should be deducted from the amount to be paid by him on account of his assessment for highways in the year 19....

In witness whereof we have this.....day of....., 19....
set our hands.

(Signed) A. B.
 C. D.
 E. F.
Commissioners of Highways.

§ 49. System of taxation defined.—The system of taxation for working and repairing highways, as hereinbefore provided, shall

be known as "The Labor System of Taxation," and the system hereinafter provided, shall be known as "The Money System of Taxation."

§ 50. Town may change its system.—Any town may change its system of taxation for working and repairing its highways, by complying with the following provisions relating thereto.

§ 51. Vote thereon.—Upon the written request of twenty-five taxpayers of any town, the electors thereof may, at a special or biennial town meeting vote by ballot upon the question of changing the system of taxation for working the highway; but no person residing in an incorporated village or city, exempted from the jurisdiction of commissioners of highways of the town, shall sign such request, or vote upon such question. (Amended by L. 1895, ch. 386, and L. 1900, ch. 25.)

Submission of proposition to electors.—The above section authorizes a special town meeting for the determination of the question of changing the system of taxation for working the highways. An application for a special town meeting to vote upon such question must be in writing addressed to the town clerk and signed by at least twenty-five taxpayers upon the last town assessment roll. Town Law, § 23. Where a special town meeting is held for such purpose the town clerk must at least ten days before the holding thereof cause notice of such meeting, under his hand, to be posted conspicuously in at least four of the most public places in the town, which notice must specify the time, place and purposes of the meeting.

Where such proposition is submitted at a biennial town meeting the application or request of the taxpayers must be filed with the town clerk twenty days before such town meeting, and such application must plainly state the question to be voted upon, and must expressly request a vote thereon at such town meeting. The town clerk is required to give at least ten days notice, posted conspicuously in at least four of the most public places in the town of any such proposed question, and that a vote will be taken by ballot at such meeting upon such question. Town Law, § 32. The application for

the submission of such a question may be in the following form:—

FORM NO. 38.

Application for Change of System of Taxation.

To A. B., Town Clerk of the Town of.....

We, the undersigned, taxpayers of the town of....., hereby request that a vote by ballot be taken at the next biennial town meeting in said town (or at a special town meeting to be duly called for said purpose) by the electors thereof entitled to vote thereon, on the question of changing the system of taxation for working the highways in said town, from the.....system of taxation to the.....system of taxation, pursuant to sections 50, 51, 52 and 53 of the Highway Law.

Dated this.....day of....., 19....

(Taxpayers sign here.)

§ 52. When change to take effect.—When a town shall have voted to change the system of taxation for working and repairing the highways, as herein provided, such change, except in so far as it affects the duties of the town assessors in indicating and placing on the assessment roll the property and persons subject to assessment and taxation for the repair of highways and of the highway commissioners and town board in determining and certifying the amount of such tax, shall not take effect until the next annual meeting of the board of supervisors, after the town meeting at which it was decided to make the change; and until such annual meeting of the board of supervisors the former system of repairing highways and of taxation therefor shall remain in force in said town; provided, however, that when such change shall have been voted at a town meeting held subsequent to the first day of July in any year, it shall not take effect, except as to the duties required to be performed by the town officers specified herein, until the second annual meeting of the board of supervisors next succeeding such town meeting. In each town of Westchester county such change shall be for a term of not less than five years. (Amended by L. 1895, ch. 386, and L. 1901, ch. 150.)

§ 53. Annual tax under money system; certain villages exempt; state aid.—Any town voting in favor of the money system

shall annually raise by tax, to be levied and collected the same as other town taxes, for the repair of the highways, an annual sum of money, which shall be equal to at least one-half the value at the commutation rates, of the highway labor which should be assessable under the labor system, but in any town in which there may be an incorporated village, which forms a separate road district, and wherein the roads and streets are maintained at the expense of such village, all property within such village shall be exempt from the levy and collection of such tax for the repair of highways of such town; and the assessors of such town are hereby required to indicate on the assessment roll the property included in such incorporated village, in a column separate from that containing a list of the property in the town not included in such village, and shall also place on the assessment roll the names of all persons liable to poll tax who are not residents of such village, and the board of supervisors are directed to levy a tax of one dollar on each person liable to poll tax as thus indicated; but this act shall not apply to assessments made for damages and charges for laying out or altering any road, or for removing any obstruction caused by snow or preventing any such obstruction, or for erecting or repairing any bridge in such town. The amount of such tax shall be determined by the commissioners of highway and the town board, who shall certify the same to the board of supervisors, the same as any other town charge. The clerk of the board of supervisors of each county containing a town which has voted for the money system, shall on or before the first day of January of each year transmit to the state comptroller a statement certified by him, and signed and verified by the chairman of such board, stating the name of each town so voting, and the amount of money tax levied therein for the repair of highways during the preceding year. The comptroller shall draw his warrant upon the state treasurer in

favor of the treasurer of the county in which such town is situated, for an amount equal to fifty per centum of the amount so levied in each town. The county treasurer shall pay the amount so paid to him on account of the money tax levied in any such town to the supervisor of the town, to be used for the repair and permanent improvement of such highways therein. The sum paid by the state to any town except to towns the assessed value of whose real and personal property is less than one million dollars by virtue of this section shall not exceed, in any one year, one-tenth of one per centum of the taxable property of such town. All moneys collected for the repair and construction of highways in any town under this section and all moneys received from the state as provided herein, shall be paid to the supervisor of the town, who shall be the custodian thereof and shall be accountable therefor. Before receiving any such moneys the supervisor shall give an undertaking to the town in an amount and with such sureties as shall be approved by the town board, conditioned for the faithful disbursement, safekeeping and accounting for the moneys that may come into his hands under this section. Such undertaking shall be filed in the office of the town clerk. The moneys collected and received under this section shall be paid out by the supervisor upon the order of the highway commissioner for the repair and permanent improvement of the highways of the town, in such manner as the commissioner of highways and the town board may determine and direct. (Amended by L. 1893, ch. 412, L. 1898, ch. 351, L. 1902, ch. 156, L. 1903, ch. 228, L. 1904, ch. 183, and L. 1904, ch. 478.)

Adoption of money system.—The labor system of working the highways was the only system available until the enactment of L. 1873, chap. 395. By that act the electors of a town were authorized to adopt a proposition for changing the mode of working the highways. If such a proposition was adopted the town was thereafter authorized to levy and collect, in the

same manner as any other tax, for the repair of its highways, a sum of money which shall be at least equivalent to the value of the day's work theretofore assessed at the commutation prices, and not to exceed \$5,000 in any one town. By the revision of the Highway Laws in 1890, the act of 1873 was repealed and re-enacted in this and the preceding two sections. By the revision the amount which could be collected for highway purposes under the money system was not limited as to the maximum, but was required to equal at least one-half the value of the highway labor at commutation rates. The amendment of 1893 exempted from highway taxes under the above section the property included in an incorporated village which forms a separate road district, and wherein the roads and streets are maintained at the expense of such village. By the so-called Fuller Act, (L. 1898, chap. 351), it was provided that the state should pay to each town adopting the money system an amount equal to 25 per cent. of the amount raised for highway purposes. This amount was increased to 50 per cent. by the so-called Plank Act, (L. 1902, chap. 156).

Poll-tax.—A tax of one dollar is included in the assessment roll against all persons liable for a poll tax, as specified in subd. 2 of § 33 of the Highway Law, ante, p. 91. A person who fails to pay such tax in the manner and at the time prescribed by law is subject to a penalty of five dollars for each such failure. See Highway Law, § 65, post, p. 135.

Levy of tax.—The amount of tax to be levied under the money system is to be determined by the commissioners of highways and the town board. Such amount must be equal to at least one-half the value at the commutation rates of the highway labor which should be assessable under the labor system, excluding the property included in an incorporated village. The amount of tax as so determined must be certified by the commissioners, and the town board, to the board of supervisors, in the same manner as any other town charge.

State aid.—The above section requires the clerk of the board of supervisors, on or before the first day of January of each year, to transmit to the state comptroller a statement, certified by him and signed and verified by the chairman of the board of supervisors, stating the name of each town which has adopted the money system, and the amount of money tax levied therein for the repair of the highways during the preceding year. The comptroller is authorized to draw his warrant upon the sum appropriated by the legislature each year, for an amount equal to 50 per cent. of the amount so levied in

each town. The money is to be paid to the county treasurer, who in turn is required to pay the same to the supervisor of the town. Where the assessed valuation of the real and personal property of the town is less than \$1,000,000 the amount to be paid by the state must in any event be equal to 50 per cent. of the amount of the money tax. Where the assessed valuation of a town exceeds \$1,000,000 the amount paid by the state cannot exceed one-tenth of one per cent. of the taxable value of the property in such town. For instance, in a town having an assessed valuation of \$900,000, which has voted to raise by tax the sum of \$2,500 for highway purposes, the state would be required to pay, if a sufficient appropriation was made therefor, the sum of \$1,250. But if the assessed valuation of a town was \$1,100,000, and the tax voted was \$2,500, the amount which the state could pay, under the above section, would only be \$1,100.

Receipt and expenditure of money.—Where the money system has been adopted the supervisor of the town is made the custodian of all moneys collected for the repair and construction of highways under the above section. Before receiving such money the supervisor must give an undertaking to the town, approved by the town board, conditioned for the faithful disbursement, safe-keeping and accounting of the highway moneys. The moneys received by the supervisor are to be paid out by him upon the order of the highway commissioner in such manner as the commissioner of highways and the town board may determine and direct.

It will be noticed that the exclusive powers of the highway commissioner over the highways of the town are modified upon the adoption of the money system. Under the labor system the moneys voted by the town or commuted by the taxpayers are expended under the sole direction and control of the highway commissioner. But upon the adoption of the money system, the commissioner no longer retains in his possession the funds raised for highway purposes, and the expenditure of such funds is under the control of the town board. It is not contemplated by the statute that the commissioner should be deprived of all discretionary power. The direction of the town board will presumably be more or less general in its character. The evident object of this change of method is to make the supervisor, as the fiscal officer of the town, the custodian of the money, and to make the town board, as the governing body of the town, the controlling power as to the manner in which the highway funds should be distributed and expended. But

the highway commissioner remains in direct charge of the work, and it is for him to see that the directions of the town board are fully complied with, and that under such directions the highways and bridges of the town are kept in a safe condition.

The action of the Highway Commissioner and the Town Board, in determining and directing the manner of repair and improvement of highways under section 53, should be by formal resolution, in joint meeting, specifying the highway or highways or particular portions thereof to be repaired or improved, the kind of improvement or extent of repairs, and the manner of causing the work to be done, whether by contract or otherwise. The town board, as a whole, has one vote as to the manner in which such highway moneys shall be used on the highways and the highway commissioner has another vote; there must be an agreement reached between the commissioner and the town board before such money can be properly expended. (Opinion of Atty. Gen'l., July 2, 1904).

Villages exempt from taxation.—By the above section incorporated villages are exempt from any taxes imposed for the maintenance and repair of highways lying outside of such villages. But this does not relieve them from assessments made for damages and charges for laying out, or altering any road, or erecting or repairing a bridge in the town. The above section is general, and applies to every case where an incorporated village within a town may be a separate road district. From a certain class of public charges or expenses connected with the highways the villages are exempt, while to another class they are subject. Bonds issued by a town for the permanent improvement of highways and for the construction and repair of bridges are a charge upon the whole town, including the villages within it. *Matter of Shapter v. Carroll*, 18 App. Div. 390.

Legalizing taxes levied in 1903.—L. 1904, chap. 38, provides as follows:—"The taxes levied in the year nineteen hundred and three for the repair of highways, upon the real and personal property in the several towns under the money system for such repair, are hereby legalized and confirmed so as to be of the same force and effect as though the boards of supervisors had, in said year, levied the minimum amount required to be raised under the provisions of chapter two hundred and twenty-eight of the laws of nineteen hundred and three. But nothing herein contained shall authorize the payment by the

state of more than fifty per centum of the amount actually raised by said towns severally."

Contracts to be filed.—All commissioners of highways in towns wherein the money system of taxation has been adopted for highway purposes, shall, within ten days after any such contracts have been made by them, by and on behalf of such towns, for the construction, care and maintenance of the public highways located therein, file such contracts with the town clerk of the town in which such highways are located. Any commissioner failing to file such contracts in such manner is guilty of a misdemeanor. L. 1895, chap. 717, §§ 2 and 3.

Forms of the certificate by the town board and commissioners as to the amount of highway tax, of the statement to be transmitted to the state comptroller as to the towns voting to adopt the money system, and the undertaking of the supervisor may be as follows:—

FORM NO. 39.

Certificate as to Amount of Highway Tax.

STATE OF NEW YORK, } ss.:
County of

To the Board of Supervisors of the County of

The undersigned, commissioners of highways and members of the town board of the town of, pursuant to the provisions of section 52 of the Highway Law, as amended by L. 1904, chap. 473, do hereby certify that the amount of tax as determined by them to be raised in the town of, during the year 19..., for the repair of highways pursuant to the provisions of such section, shall be the sum of dollars, which sum is in excess of (or equal to at least) one-half the value at the commutation rates of the highway labor which should be assessable under the labor system.

Dated, 19.... (Signed by Commissioners of Highways
and Members of Town Board.)

FORM NO. 40.

Statement of Towns Voting Money System.

To Comptroller of the State of New York:—

The following towns in the county of have voted in favor of the money system, and are now maintaining their highways under such system, and there has been levied upon such towns for the repair of highways during the preceding year the amount of money tax set opposite the names thereof. The assessed valuation of the taxable property of each of such towns is as indicated in the following list:—

Name of Town.	Amount of Tax.	Value of Taxable Property.
Afton.	\$2,000.	\$900,000.
Greene.	3,000	1,300,000

(Signed) A. B., Chairman of Board of Supervisors
of County of

STATE OF NEW YORK, } ss.:
County of

A. B., being duly sworn, deposes and says:—That he is the chairman of the board of supervisors of the county of That the fore-

going statement as to the towns in the county of which have adopted the money system, and the amount of tax, and the value of the taxable property of such towns is correctly stated therein as appears by the certificates of the town boards and commissioners of highways of such towns and the other records and papers submitted to the board of supervisors of such county.

Subscribed and sworn to before me this

.... day of, 19....

.....

STATE OF NEW YORK, } ss.:
County of

I, C. D., clerk of the board of supervisors of the county of, have read the foregoing statement, and have compared the certificates submitted to the board of supervisors of the county of by the commissioners of highways and town boards of the above towns with the amounts stated in the above list, and certify that the same is in all respects true and correct.

IN WITNESS WHEREOF I have hereunto set
my hand, and the official seal of the board of
supervisors of the county of, on this
.... day of, 19....

C. D., Clerk of Board of Supervisors of
the County of

FORM NO. 41.

Undertaking of Supervisor.

KNOW ALL MEN BY THESE PRESENTS, that we, A. B., Supervisor of the Town of, in the County of, and State of New York, as principal, and C. D. and D. E., as sureties, of the same town, are held and firmly bound unto the town of, in the sum of dollars, (the amount of the bond to be fixed by the town board), to be paid to the said town, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated
day of, 19....

The condition of this obligation is such that if the above named A. B., as supervisor of such town, shall safely keep, faithfully disburse and fully and justly account for and pay over all the moneys received by him as supervisor of such town from highway taxes raised therein, and from moneys received by him from the county treasurer on account of the apportionment to such town of moneys appropriated by the state, pursuant to and under the provisions of section 53 of the Highway Law, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) A. B.,
C. D.,
D. E.

Acknowledgment and justification as in Form No. ..., ante, p.—.

County of, ss.:

The undersigned, members of the town board of the town of, hereby approve of the within bond as to the amount thereof, its form and manner of execution, and of the sufficiency of the sureties therein.

Dated, day of, 19....

(Signed by Members of Town Board.)

FORM NO. 41a.

Order of Commissioner on Supervisor.

No..... Town of..... \$.....

To.....

Supervisor Town of.....

Pay to.....

or order, from highway moneys collected and received by you under section 53 of the Highway Law;

..... dollars for labor and material, furnished for repair and permanent improvement of the highways of the town, as heretofore determined and directed by the Commissioner of Highways and the Town Board of said town.

..... Commissioner of Highways.

Dated....., 19....

§ 53-a. Duty of highway commissioners in certain towns.—In towns where the money system of taxation has been adopted for working highways, it shall be the duty of each owner of lands and occupant of lands owned by nonresidents, situated along the highway, to cut the noxious weeds and brush growing within the bounds of the highway fronting such lands at least twice in each year, once before the first day of July and again before the first day of September, and also to remove all fences, brush, shrubbery or other obstruction causing the drifting of snow upon said highway before the first day of November in each year. If the owner or occupant fails to cut such weeds or brush and remove such fences, brush, shrubbery or other obstruction causing the drifting of snow as provided in this section, the commissioner of highways of the town in which such lands are situated shall cause the same to be done, and shall give such owner notice in writing served personally or by mailing to his postoffice address, if the commissioner can with due diligence ascertain the same, stating that at a specified time and place the commissioner will assess the cost thereof against such owner so neglecting, and return the same to the town board of his town at the meeting held on the Thursday next preceding the annual meeting of the board of supervisors, stat-

ing the name of each owner, and the amount assessed against him. The time so fixed shall not be less than eight days after the personal service or the mailing of such notice. The town board shall certify the amount of the assessment made by the highway commissioner to the board of supervisors. The board of supervisors shall cause the amount so returned to them by the town board to be levied against such delinquent owner and added to his highway tax for the next ensuing year. (Added by L. 1900, chap. 516, and amended by L. 1903, chap. 136 and L. 1904, chap. 478.)

Removal of noxious weeds.—It is made the duty of overseers of highways to cause noxious weeds within the bounds of the highways within his district to be cut down or destroyed twice in each year, once before July 1st, and again before September 1st. The owners of lands adjoining highways are required to cut the weeds, brier and brush within the bounds of the highway between the 15th day of June and the 1st of July, and between the 15th of August and the 1st of September (Highway Law, § 70); and overseers or commissioners, in case there be no overseers, must notify the owners or occupants of such lands to cut such weeds, brier and brush, and if they are not cut within ten days after receiving the notice, the overseer or commissioner may do the work and the expense thereof may be charged against the land. Highway Law, § 71.

The amendment of 1904, ch. 478, authorizes commissioners of highways in towns which have adopted the money system to direct the removal of fences, brush, shrubbery, or other obstructions causing the drifting of snow upon highways. Section 72 of the Highway Law provides for the abatement of tax for the removal of a fence for the purpose of preventing the drifting of snow. By L. 1890, chap. 291, ante p. 82, a town may vote at a town meeting to raise money for the purchase of wire fences to be erected at places where the highways are obstructed by existing fences. The above section apparently authorizes a commissioner to summarily remove a fence which causes the drifting of snow upon a highway. In case of the failure of the owner to remove such fence after being notified by the commissioner, the expense of such removal may be charged against the owner of the land. This will probably not be deemed to modify the provisions of § 72, authorizing an

abatement of highway tax where fences are voluntarily removed by the owner of the lands.

The amendment of 1904 seems to radically modify the former theory as to the existence of such fences. The former statute apparently recognized the right of an owner of adjoining land to erect and maintain a fence regardless of the fact that it caused the drifting of snow, but in order to encourage the removal of such fences or the using of fences which were not likely to produce such drifting the law granted to the owner for the removal of such fence an abatement of his highway tax, and also furnished him free of charge wire fencing in place of the fence taken down, in case the town should vote a tax therefor.

§ 53-b. State to share expense of maintaining certain county roads.—Whenever any county has heretofore constructed, in pursuance of this chapter, or of any other general or special law, a county road or roads, without expense to the state, the state shall be liable to annually contribute toward the expense of maintaining such road or roads fifty per centum of the amount appropriated by such county for the maintenance of such road or roads during the preceding year. The clerk of the board of supervisors of a county entitled to a contribution from the state toward the maintenance of its roads under this section shall annually, on or before the first day of January, transmit to the state comptroller a statement certified by him and signed and verified by the chairman of such board, stating the amount appropriated by the board of supervisors of such county for the maintenance of such county road or roads during the preceding year. The comptroller shall draw his warrant upon the state treasurer in favor of the treasurer of such county, for an amount equal to fifty per centum of the amount so appropriated. Such money shall be applicable to the repair and permanent improvement of such county road or roads, and shall be expended in the same manner as money appropriated by the county for such purpose. The sum paid by the state to any

county by virtue of this section shall not exceed in any one year, one-tenth of one per centum of the taxable property of such county. (Added by L. 1903, chap. 269.)

§ 54. Adoption of county road system.—The board of supervisors of any county may, by a vote of a majority of the members thereof, by resolution, adopt the county road system, and shall as soon as practicable after the adoption of such resolution, cause to be designated as county roads, such portions of the public highways in such county as they shall deem advisable, outside of the limits of any city in such county, and shall cause such designation and a map of such county roads to be filed in the clerk's office of such county; the roads so designated shall, so far as practicable, be leading market roads in such county. (Added by L. 1893, chap. 333, and amended by L. 1895, chap. 375.)

The above section authorizes the adoption of what is called the county road system. The evident object of the section was to enable a board of supervisors to designate certain leading highways in the county as county roads, to be constructed, repaired and maintained at the expense of the county, leaving all other roads than those so designated as town roads to be constructed and maintained as formerly at the expense of the several towns.

Laying out county highways by board of supervisors.—A board of supervisors is authorized upon the application of twenty five resident taxpayers to lay out, open, alter or discontinue a county highway therein, and to construct, repair or abandon a county bridge. See County Law, § 61, post.

County supervision.—L. 1902, ch. 396, added article 8 to the Highway Law, post, which authorizes a board of supervisors of any county to adopt a resolution providing that on and after such adoption the highways in the county shall be under the supervision of the county engineer. When such resolution is adopted the highways in the county become subject to the general supervision of a county engineer, although the powers and duties of the commissioners of highways remain the same, to be exercised and performed as directed by such engineer.

§ 55. County engineer.—The board of supervisors of any county may appoint a county engineer who shall be removable at its pleasure. The term of office of each county engineer so appointed shall be three years, unless sooner removed, and his salary shall be fixed by the board of supervisors and be a county charge. The county engineer shall visit and examine the highways in each town of the county and advise and direct the commissioners of highways how to best repair, maintain and improve the same. After such examination the county engineer shall establish such grades and indicate such means of drainage, repairs and improvements as seems to him to be necessary. The county engineer shall forward to the state engineer and surveyor and to the clerk of the board of supervisors of the county at such times as shall be fixed by the state engineer and surveyor his report of the conditions of the highways in each town of the county. He shall carefully inspect the highways in the county which have been improved pursuant to the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and shall furnish a detailed report showing the required repairs and the estimated cost thereof to the state engineer and surveyor at such times as shall be fixed by the state engineer and surveyor. The work of repairing, improving or erecting bridges in any town of such county shall be done under the general supervision of the county engineer pursuant to plans prepared or approved by him. A county superintendent of highways may be appointed in any county by the board of supervisors instead of a county engineer and when so appointed, he shall have all the powers and perform all the duties herein prescribed for a county engineer. (Added by L. 1893, chap. 333, and amended by L. 1901, chap. 239, L. 1902, chap. 52 and L. 1904, chap. 609.)

This section as formerly added by L. 1893, chap. 333, provided only for the appointment of a county engineer in coun-

ies adopting the county road system under the preceding section. The Amendment of 1902 authorized the appointment of a county engineer in any county. His powers have been materially extended by the amendment of 1904, so that under the existing law a county engineer when appointed is given general power of visitation and inspection over the highways of every town in the county. He is given special control over highways which have been constructed under the so-called State Aid Act, L. 1898, chap. 115, post p.). The repairing, improving and erecting of bridges in any town of the county is under his general supervision, and must be pursuant to plans prepared or approved by him.

There is at the present time a decided movement in favor of the expenditure of large sums of money contributed by state, county and towns in the construction, improvement and maintenance of highways. This movement has brought about new and improved methods of construction. The old barbaric methods and devices used by commissioners of highways and other highway officers under former systems are being gradually set aside. The development in road construction necessitates the supervision of competent engineers. It will doubtless only be a short time, if the present movement in the way of improvement of the highways continues, before every county, because of its investment in good roads, will need the aid and constant services of men especially trained as road engineers. The above section will permit the counties to meet this need by the appointment of competent engineers at a compensation sufficient to enable them to devote practically their entire time to state and county highways.

Duties as to sidepaths.—Upon the appointment of a county engineer the duties of sidepath commissioners, under L. 1899, chap. 152, as amended, and to be assumed by him, and the office of such commissioners is abolished, see L. 1899, chap. 152, § 9, as amended by L. 1904, chap. 342, post.

§ 55-a. Classes of highways; map and survey.—The board of supervisors of any county may cause the highways of the county to be surveyed and designated upon a map in two classes: First, those which have been improved under the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory hereof, or are deemed to be of sufficient public importance to

come within the purposes of that chapter; second, all other highways of the county which may however be further classified by such board of supervisors if deemed of sufficiently different degrees of relative importance for common traffic and travel. Such survey and map shall be made by the county engineer, if there be one, and copies thereof shall be filed in the office of the state engineer and surveyor, the county clerk of the county, and of each town clerk thereof. Resurveys and amended maps may be similarly made and filed. (Added by L. 1904, chap. 609).

§ 55-b. Maintenance of improved highways.—All highways which have been, or shall hereafter be improved pursuant to the provisions of such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, shall be maintained by the commissioners of highways of the town or towns, where the same are located in accordance with such directions as shall be given for such maintenance by the state engineer and surveyor and such plans, specifications, rules and regulations in addition thereto as may be prescribed therefor by the county engineer, if there be one, and approved by the state engineer and surveyor; so far as practicable, such improved highways shall be maintained by contract. If any of the commissioners of highways shall fail or neglect to properly provide for the care and maintenance of such improved highways within such time and in such manner as may be prescribed, the county engineer, if there be one, may cause the same to be performed and the expense thereof shall be paid by the county treasurer out of any funds in his possession not otherwise appropriated, upon whom such county engineer shall make a draft therefor and the amount thereof shall be included by the board of supervisors of such county in its next annual tax levy as a county charge, unless the same be apportioned upon the town or towns which such board deems benefited thereby, in

which case it shall be included in the tax so levied upon the town or towns to which it shall be apportioned. Nothing herein shall be deemed to limit the powers of the state engineer or surveyor over any such roads. The board of supervisors of any county, may, by a resolution duly passed, determine that the maintenance of such improved highways or any other highways within the county shall be under the sole control and care of the county engineer, subject to the rules and regulations of the state engineer and surveyor, and upon the adoption of such plan by the board of supervisors, the expense of said maintenance shall be paid by the county treasurer upon the draft of the county engineer therefor, and the same shall be levied as a county or town charge, as above provided. (Added by L. 1904, chap. 609).

§ 55-c. Rules and regulations to be observed by commissioners of highways.—Commissioners of highways in the several towns of this state, within which any highways have been improved, or may hereafter be improved pursuant to the provisions of such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, or which have adopted or may hereafter adopt the money system of highway taxes pursuant to sections fifty, fifty-one, fifty-two and fifty-three of the highway law, shall comply with the directions of the state engineer and surveyor, and the plans, specifications, rules and regulations in addition thereto of the county engineer, if there be one, when approved by the state engineer and surveyor, for the repair and maintenance of the highways thereof, and the state engineer and surveyor may by notice to the comptroller, cause him to withhold from any town the moneys otherwise due from the state under said section fifty-three in which the highway commissioners shall have failed to comply with this section. (Added by L. 1904, chap. 609).

§ 55-d. When county may be compelled to appoint county engineer.—The state engineer and surveyor may also refuse to cause the improvement of any further highways pursuant to said chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, in any county until the board of supervisors of such county has duly appointed a county engineer, whenever he deems it necessary for the proper care and maintenance of such highways and may also in any county containing towns which have adopted the money system of highway taxes, in which county the whole moneys collected and received pursuant to said section fifty-three exceed ten thousand dollars, by notice to the comptroller cause him to withhold from the towns in such county which may have adopted such money system of highway taxes, the moneys otherwise due from the state under said section fifty-three until the board of supervisors of such county has duly appointed a county engineer, whenever he likewise deems it necessary for the proper repair and maintenance of the highways of the town. (Amended by L. 1904, chap. 609).

§ 56. Apportionment of expenditures for county roads.—The expense of improving, repairing and maintaining the county roads of each county, shall be a county charge, and in any county in which during the past five years there has been expended at least the sum of five hundred thousand dollars for macadamizing purposes, the expense of constructing, improving, maintaining and repairing such county roads, shall be annually apportioned by the board of supervisors of the county, upon the various towns and cities within the county, as the said board may deem just. The money necessary to improve, repair and maintain the county roads or to pay the principal and interest of any bonds issued as provided in the next sec-

tion, shall be levied and collected at the same time and in the **same** manner as money for other county charges is levied and collected. The board of supervisors shall designate the **amount** of money to be expended upon each county road, and **may** make rules and regulations for the government of the **county engineer** and regulating the expenditure of such money. (Added by L. 1893, chap. 333, and amended by L. 1895, chap. 375).

Sections 56, 57, 58 and 59a of the Highway Law only apply to towns which have adopted the county road system, under section 54.

§ 57. Bonding county for county roads.—The board of supervisors of such county may borrow money from time to time for the construction, maintenance and repair of the county roads in such county, and except in cities and incorporated villages for the building and maintenance of sidewalks at such places as the board may direct, provided, however, that wherever any property owner petitions the board for the building of a sidewalk in front of his premises, and such property owner shall pay one-half of the cost of said improvement, it shall be the duty of the board to build such sidewalk in such manner as such board may deem best; and may issue the bonds or other evidences of indebtedness of the county therefor; but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum, and shall not be for a longer term than twenty years, and shall not be sold for less than par. (Added by L. 1893, chap. 333, and amended by L. 1904, chap. 646).

§ 58. Jurisdiction of county roads. Money system to prevail in town of a county adopting county road system.—The county roads in any county shall be exclusively under the jurisdiction of the board of supervisors and the county engineer of the

county, and exempt from the jurisdiction of the highway officers or officers performing the duty of highway commissioners of the several towns and villages in which such county roads are located. The system of taxation for working and repairing the highways other than the county roads in a town in a county in which the county road system is adopted, shall be the money system of taxation, provided, however, that in the county of Queens, the system as now provided by special act shall be continued. (Added by L. 1893, chap. 333, and amended L. 1895, chap. 375.)

§ 59-a. **Surplus of proceeds of county bonds.**—If the proceeds of any county bonds issued for the construction of certain specified highways shall exceed the amount necessary for the construction of said highways, the board of supervisors may, in their discretion, apply such excess or any part thereof to the construction and improvement of other roads already adopted into the county road system; or to the maintenance of the roads for the construction of which said bonds were issued; or to the payment of interest or principal, or both, of said bonds. (Added by L. 1898, chap. 641.)

ARTICLE III.

The Duties of Overseers of Highways, and the Performance of Highway Labor.

Section 60. Notice to work.

61. Notice to non-residents.
62. Commutation.
63. Teams and implements.
64. Substitutes.
65. Penalties for neglect to work or commute.
66. Assessment for unperformed labor.
67. Penalty for refusal of overseer to provide list.
68. Collection of arrearages for unperformed labor.
69. Annual return of overseers.
70. Noxious weeds in highway.
71. Overseers to notify occupant to remove weeds.
72. Abatement of tax for removal of fence.
73. Abatement of tax for street lamps.
74. Rebate of tax for using wagon tires of certain width.

§ 60. Notice to work.—Every overseer of highways shall give at least twenty-four hours notice to all residents of his district, and corporations assessed to work upon the highways therein, of the time and place at which they are to appear for that purpose, and with what teams and implements, and that they will be allowed at the rate of one day for every eight hours of work on the highways, between seven o'clock in the forenoon and six o'clock in the afternoon. The notice to corporations shall be served personally on an agent thereof residing in the town, if any, or if none, by filing the notice in the office of the town clerk, at least five days before the labor shall be required; and any number of days not exceeding fifty, may be required to be performed by any such corporation in any one day.

Assessments for highway labor are made by the commissioners of highways, and the assessment rolls prepared by them contain the names of all persons assessable for highway labor, with the number of days which each of such persons shall be assessed. Copies of such lists are to be transmitted to the overseers by the town clerk. Highway Law, §§33, 34, ante, p. 91. Omitted names and new inhabitants are to be added by the overseers. Highway Law, § 35, ante, p. 99.

Notice to work.—Under the above section the overseer of each district is required to notify all persons named in his list to appear at a certain time and place to work upon the highways therein. Such notice to residents of the district need not be in writing. It is made the duty of commissioners of highways to require overseers to warn all persons and corporations assessed to work on the highways to come and work thereon with such teams and implements and at such times as the commissioners or any one of them shall direct. Highway Law, § 4, sub. 6, ante, p. 30. The commissioners may, therefore, notify the overseers as to the times when the highway labor should be performed, and it is for the commissioners to see that the highway labor assessed in the several highway districts is worked out or commuted for as provided by the statute.

Notice to corporations.—Notice to corporations assessed for highway labor must be served personally on an agent thereof

residing within the town. So if the corporation assessed is a railroad corporation it would be sufficient to serve the notice upon the station agent residing within the town. If there is no agent of the corporation within the town the notice may be filed in the office of the town clerk. The notice required to be given to a corporation may be in the following form:—

FORM NO. 42.

Notice to Corporation.

To T. W., a Corporation (or R. S., Agent of T. W.):

Take notice that you (or T. W.) are assessed days' labor in highway district No., in the town of, county of, and that said labor is required to be performed on the highway (state where) in said district, on the day of next, and the days following, and you are required to furnish (state what utensils, if any), and to perform days' labor in a day, and will be allowed one day for every person working on said highway between seven o'clock in the A. M. and six o'clock in the P. M.

Dated this day of 19....

L. M.,

Overseer of Highway District No.

§ 61. Notice to non-residents.—Every overseer of highways shall give at least five days notice to every resident agent of every non-resident land-holder, whose lands are assessed, of the number of days such non-resident is assessed, and the time and place in which the labor is to be performed. If the overseer can not ascertain that such non-resident has an agent within the town, he shall file a written notice in the office of the town clerk, at least twenty days before the time appointed for performing such labor, containing the names of such non-residents when known, and a description of the lands assessed, with the number of days' labor assessed on each tract, and the time and place at which the labor is to be performed.

Notice to non-residents.—The above section requires overseers to serve a written notice upon the resident agent of every non-resident land holder in the highway district, provided such land holder has such an agent in the town. *Chamberlain v. Taylor*, 36 Hun. 24.

The notice to an agent of a non-resident land owner, if residing in the town, and the notice to non-residents to be filed in the office of the town clerk may be as follows:—

FORM NO. 43.

Notice to Agent of Non-resident.

To R. S., Agent of T. W., a Non-resident Owner of Lands in the Town of in the County of

Take notice that T. W., a non-resident of the said town, is assessed days' labor in highway district No., in said town, and that said labor is required to be performed on the highways (state where) in said district on the day of next, and the days following.

Dated this day of 19....

L. M.,
Overseer of Highway District No.

FORM NO. 44.

Notice to Non-residents to be Filed in the Office of Town Clerk.

Notice is hereby given that the highway labor assessed on the following described parcels of land in the town of county of owned by non-residents whose agents cannot be ascertained within such town, is required to be performed from the day of to the day of next, in highway district No., in said town, on the highway (state where).

OWNER'S NAME.	Description of Lands.	Days Assessed.

Dated this day of 19....

L. M.,
Overseer of Highway District No.

§ 62. Commutations.—Every person and corporation shall work the whole number of days for which he or it shall have been assessed, except such days as shall be commuted for, at the rate of one dollar per day and such commutation money shall be paid to the overseers of highways of the district in which the labor shall be assessed, within at least twenty-four hours before the time, when the person or corporation is required to appear and work on the highways; but any corporation must pay its commutation money on or before the first day of June in each year to the commissioner or commissioners of highways of the town in which the labor shall be assessed, and such commutation money shall be expended by the

commissioner or commissioners of highways upon the roads and bridges of the town as may be directed by the town board except that in the counties of Albany, Dutchess, Fulton, Hamilton, Greene, Herkimer, Lewis, Montgomery, Putnam, Richmond, Rockland, Schoharie, Sullivan, Tompkins, Ulster, Westchester and Yates, the commissioner or commissioners shall pay the same to the overseers of the districts, respectively, in which the labor commuted for was assessed. (Amended by L. 1895, chap. 579, L. 1896, chap. 973, L. 1897, chap. 334, L. 1899, chap. 345, L. 1900, chap. 153, L. 1902, chap. 105, L. 1903, chap. 27, and L. 1904, chap. 495.)

Highway taxes in towns where the labor system of working the highways is in force may be either paid in labor upon the highways or in money at the rate of one dollar for each day assessed. Highway Law, § 33, sub. 3, ante, p. 91. The money paid for highway tax thus assessed is called commutation money. The statute provides that such commutation money shall be paid within at least 24 hours before the time when the person or corporation is required to appear and work on the highways. Ordinarily such money is paid to the overseer, and is to be expended upon the highways in the district where assessed.

Payment of commutation money by corporations.—Under this section as amended by L. 1904, chap. 495, corporations must pay their commutation money to the commissioners of highways, to be expended by them upon the highways and bridges of the town, as directed by the town board. In the counties named the commutation moneys are to be paid to the commissioners who in turn are required to pay the amount assessed in each district to the overseer thereof, to be expended by him upon the highways therein.

§ 63. Teams and implements.—Every overseer of highways may require a team, or a cart, wagon or plow, with a pair of horses or oxen, and a man to manage them, from any person having the same within his district, who shall have been assessed three days or more, and who shall not have commuted for his assessment; and the person furnishing the same upon

such requisition, shall be entitled to a credit of three days for each day's service therewith.

The above section authorizes the overseer to require a person assessed for three days or more of highway labor to furnish a team, or a cart, wagon or plough with a pair of horses or oxen, and a man to manage them. The person furnishing the same is entitled to a credit of three days for each day's service of the man with the team, etc.

§ 64. Substitutes.—Every person or corporation assessed to work on the highways, and warned, who does not commute therefor, may appear in person or by an able bodied man as a substitute. A day's labor shall be eight hours of work, and every person or corporation assessed more than one day shall be allowed to work ten hours in each day.

A day's labor consists of eight hours' work. But a person or corporation assessed more than one day may be allowed to work ten hours in each day, and should be credited for the overtime. The overseer should see that each full day's work is performed and under the next section a penalty may be imposed at the rate of \$1.50 a day for each hour that the person assessed, or is substituted, fails to labor.

§ 65. Penalties for neglect to work or commute.—Every person or corporation assessed highway labor, who shall not commute, and who shall not appear and work when duly notified, shall be liable to a penalty of one dollar and fifty cents for every day he shall so fail to appear and work; and for wholly omitting to comply with any requisition to furnish a team, cart, wagon, implements and man, he shall be liable to a penalty of five dollars for each day's omission, and for omitting to furnish either a cart, wagon, plow, team or man to manage the team, he shall be liable to a penalty of one dollar and fifty cents for each day's omission; and if any person shall after appearing, remain idle, or not work faithfully, or hinder others from working, he shall be liable to a penalty at the rate of

one dollar and fifty cents a day, for each hour. In those towns in which the money system of taxation has been adopted, any person who is taxed a poll tax for highway purposes as provided in section fifty-three of this chapter, and who does not pay such tax in the manner and at the time, prescribed by law, shall be liable to a penalty of five dollars. The penalties herein imposed, may be recovered by action by the overseer of highways as such, or by the highway commissioner in those towns having no such overseers, and, when collected, shall be expended and disposed of by the overseer or commissioner in the same manner as commutation moneys. The penalties, when recovered, shall be applied in satisfaction of the labor assessed, for omission to perform which, the penalties were respectively imposed. The overseer of highways may excuse any omission to perform labor when required, if a satisfactory reason shall be given therefor; but the acceptance of any such excuse shall not exempt the person excused from commuting for, or working the whole number of days for which he shall have been assessed during the year. (Amended by L. 1902, chap. 242.)

Recovery of penalty.—The penalties imposed by the above section are, in towns where overseers of highways are appointed, to be recovered in an action brought by the overseer. If it be shown that the plaintiff in such an action is not an overseer, the defect is jurisdictional, and no recovery can be had. *Walker v. Mosely*, 2 Den. 102.

The penalties when recovered are to be applied in satisfaction of the labor assessed, and are to be expended upon the highways in the district in the same manner as commutation money.

A private action will not lie against an overseer for an error of judgment in adjudging a person to be in default for not working out his highway tax, and in instituting a proceeding against him for the collection thereof. *Freeman v. Cornwall*, 10 Johns, 470. Nor will such an action lie against an overseer upon the ground that the commissioner in making the assessment had exceeded his authority. *Potter v. Benniss*, 1 Johns, 515.

Money system.—Where the money system is adopted the poll tax is assessed as provided in § 53, ante, p. 112, and if not paid a penalty may be collected as above provided.

§ 66. Assessment of unperformed labor.—Every overseer of highways shall on or before September first of each year, or at such other time as the board of supervisors may by resolution prescribe, make out and deliver to the commissioner of highways of his town, a list of all persons and corporations who have not worked out, or commuted for their highway assessment, with the number of days not worked or commuted for by each, charging for each day in such a list, at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and persons unknown, which were assessed on his warrant by the commissioners of highways, or added by him, on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day, which list shall be accompanied by the affidavit of the overseer, that he has given the notice required, to appear and work, and that the labor specified in the list returned has not been performed or commuted, and it shall be the duty of the commissioner of highways to collect and present such lists to the town board of his town at the meeting held on the Thursday next preceding the annual meeting of the board of supervisors. The town board shall certify the amount of unpaid taxes so returned to them by the commissioner of highways to the board of supervisors.

List of unperformed labor by commissioner.—The commissioner of highways is required to inspect the highways and bridges in each highway district between September 1st and September 15th in each year, and if it appears upon such inspection that the labor assessed has not been entirely performed in a highway district, the commissioner shall transmit a statement to

the supervisor of his town containing the number of days' labor which in his opinion have not been performed in such district, and "a list of all persons and corporations owning property therein, and the number of days' labor still to be performed by such persons and corporations." The supervisor is then required to give a hearing to all persons mentioned in such list, and after correcting the list in accordance with the facts as they appear to him, is required to make a return of the unperformed labor to the board of supervisors. Highway Law, § 4, sub. 1, ante, p. 20.

The overseer of highways under the above section is required to make out a list of all persons and corporations who have not worked out or commuted for their highway assessment. The list furnished by the overseer is to be presented to the commissioner of highways. The commissioner is then required to present the list to the town board at the meeting held on the Thursday next preceding the annual meeting of the board of supervisors, and the town board is required to certify the amount of unpaid taxes so returned to them by the commissioner of highways to the board of supervisors. The list furnished by the overseer may be in the following form:—

FORM NO. 45.

Overseers' Return of Unperformed Labor.

To A. B., C. D. and E. F., Commissioners of Highways of the Town [REDACTED]
....., County of

The following is a list of all the resident landholders residing in highway district No., in the said town of , who have not worked out their highway assessments for the year 19..., or commuted for the same, with the number of days not worked or commuted for each, at one dollar and fifty cents per day; and also a list of all the lands of non-residents and of persons unknown, which are assessed by my warrant by the commissioners of highways (or added by me according to law), on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging each at the rate of one dollar and fifty cents per day.

LIST OF RESIDENTS.

OWNER'S NAME	Description of Land	Assessed Value	Number of Days	Amount

LIST OF NON-RESIDENT LANDS.

OWNER'S NAME	Description of Land	Assessed Value	Number of Days	Amount

L. M.,
Overseer of Highway District No.

STATE OF NEW YORK, } ss.:
County of

L. M., being duly sworn, says he is the overseer of highway district No., in the town of in the county of and that he has given the notices to appear and work, required by sections 60 and 61 of the highway law, and that the labor for which such residents and such land is returned, has not been performed or commuted for.

L. M.,
Overseer of Highway District No.

Subscribed and sworn to before me,
this day of, 19....

G. H.,
Justice of the Peace.

§ 67. Penalty for refusal of overseer to provide list.—If any overseer shall refuse or neglect to deliver such list to the commissioner of highways, or to make the affidavits herein directed, he shall for every such offense, forfeit the sum of ten dollars and the amount of taxes for labor remaining unpaid, at the rate of one dollar for each day assessed. The commissioner of highways shall, in case of such refusal or neglect, recover such penalty and apply the amount recovered in making and improving the highways and bridges of the delinquent overseer's district. (Amended by L. 1898, chap. 350.)

§ 68. Collection of arrearages for unperformed labor.—Each board of supervisors, at its annual meeting in each year, shall cause the amount of such arrearages for highway labor returned to them, estimating each day's labor at one dollar and fifty cents a day, to be levied and collected from the real or

personal estate of the person, corporation, or from the non-resident real estate, specified in such list, to be collected by the collectors of the several towns, in the same manner that other town taxes are collected, and shall order the same, when collected, to be paid over to the commissioners of highways of the town wherein the same is collected, to be by them applied toward the construction, repairs and improvement of the highways and bridges in the district in which the labor was originally assessed.

It becomes the duty of the board of supervisors, at its annual meeting to cause the amount of all such arrearages of labor, estimating a day's labor at \$1.50, to be levied on the land, so returned, and to be collected in the same manner as the other contingent charges of the county are levied and collected. Chamberlain v. Taylor, 36 Hun. 24. From each of the levies so made by the board of supervisors upon the land in the several highway districts of the town, the supervisors are to make up the tax list for the whole town, and attach their warrant thereto. Idem.

§ 69. Annual return of overseers.—Every overseer of highways shall, on the second Tuesday next preceding the time of holding the annual town-meeting in his town, within the year for which he is elected or appointed, render to one of the commissioners of highways of the town, an account in writing, verified by his oath, and containing.

1. The names of all persons assessed to work on the highways in the district of which he is overseer.
2. The names of all those who have actually worked on the highways, with the number of days they have so worked.
3. The names of all those from whom penalties have been collected, and the amounts thereof.
4. The names of all those who have commuted, and the manner in which the moneys arising from penalties and commutations have been expended by him.

5. A list of all persons whose names he has returned to the supervisor as having neglected or refused to work out their highway assessments, with the number of days and the amount of tax so returned for each person, and a list of all the lands which he has returned to the supervisor for non-payment of taxes, and the amount of tax on each tract of land so returned; and he shall then and there pay to the commissioners of highways, all money remaining in his hands unexpended, to be applied by them in making and improving the highways and bridges of the town, in such manner as they shall direct; and if he shall neglect or refuse to render such account, or if, having rendered the same, he shall refuse or neglect to pay any balance which then may be due from him, he shall for every such offense, forfeit the sum of ten dollars.

The return of overseers required by the above section may be in the following form:—

FORM NO. 46.

Annual Return of Overseers of Highways.

To the Commissioners of Highways of the Town of in the County of

The undersigned, overseer of highway district No., in said town, hereby renders the following account pursuant to section 69 of the highway law:

1. The names of all persons assessed to work on the highways in said district are as follows:

NAMES.	Days Assessed.

2. The names of all persons who have actually worked on the highways, with the number of days they have worked, are as follows:

NAMES.	Days Assessed.

3. The names of all those who have been fined, and the sums in which they have been fined, are as follows:

NAMES	Amount.

4. The Names of those who have commuted, and the amount of the commutations, are as follows:

NAMES.	Amount.

5. The moneys arising from penalties and commutations have been expended as follows: (State how.)

6. Names returned to the commissioners of highways of persons who have neglected or refused to work out their highway assessments, with the number of days and amount of tax so returned, are as follows:

NAMES.	Days Assessed.	Amount of Tax.

7. The following is a list of lands returned to the commissioners of highways for non-payment of taxes:

NAMES OF OWNERS.	Description.	Assessed Value.	Number Days.	Amount.

Dated this day of 19....

L. M.,

Overseer of Highway District No.

COUNTY OF }
Town of } ss.:

L. M., being duly sworn, says he is overseer of highway district No., in the town of , and that the foregoing account subscribed by him is true to the best of his knowledge and belief.

L. M.,

Overseer of Highway District No.

Subscribed and sworn to before me,
this day of 19....

G. H.,
Justice of the Peace.

§ 70. **Noxious weeds in highway.**—Every person or corporation, owning or occupying, under a lease for one or more years, any lands, abutting upon any highway, shall cause all noxious weeds, briars and brush growing upon such lands within the bounds of the highway, to be cut or destroyed between the fifteenth day of June and the first day of July, and between the fifteenth day of August and the first day of September, in each and every year; but boards of supervisors may fix a different period or periods, for such cutting or destruction in their respective counties. No person shall place or cause to be placed, any noxious weeds, or the seeds of such weeds, within the bounds of any public highway. Any willful violation of this section, shall subject the person or corporation so offending to a penalty of ten dollars for each offense. (Amended by L. 1899, chap. 681.)

Destruction of noxious weeds.—The electors of each town may, at their biennial town meeting, make provisions and allow rewards for the destruction of noxious weeds, and raise moneys therefor. Town Law, § 22, sub. 5. Boards of supervisors are authorized to make such laws and regulations for the destruction of wild and noxious weeds within the county. County Law, §12, sub. 7. It is the duty of the overseer of highways to cause noxious weeds within the bounds of the highways to be cut down or destroyed twice in each year. Highway Law, § 20, sub. 3, ante, p. 74. In towns where the money system of taxation has been adopted it is the duty of each owner of lands, or occupant of lands owned by non-residents, situated along the highway to cut the noxious weeds and brush growing within the highway adjoining such lands at least twice in each year. Highway Law, § 53a, ante, p. 120.

§ 71. **Overseers or commissioners of highway to notify owners or occupants to remove weeds and obstructions causing snow drifts.**—The overseer of every highway district, or if there be no such overseer, the commissioner of highways, shall give written notice to any owner or occupant of the premises to cut all

weeds, briers and brush growing within the bounds of the highway, and to remove all fences, shrubbery or other obstruction causing snow to drift in and upon said highways. If the owner of such lands is a non-resident such notice shall be served personally upon the agent of such non-resident owner residing in the town, or if there be no such agent known to the commissioner or overseer of highways, such notice shall be sent by mail to the last known address of such non-resident owner and a copy thereof shall be filed in the office of the town clerk of the town where the property is situated. If such owner or occupant shall not cut such weeds, briers and brush and remove such fences, shrubbery or other obstruction, as so required within ten days after receiving such notice, or within ten days after such notice shall have been served or filed as herein provided, such overseer or commissioner of highways shall do such work and make a report under oath to the supervisor of the town of the amount expended by him thereon, and the ownership and occupancy of the several parcels of land against which the labor was performed, on or before the first day of November in each year; such supervisor shall certify these statements to the board of supervisors at its next annual meeting, and such board shall include the amounts included in such statements in the taxes assessed upon the lands upon or against which the labor was performed, the same to be collected with the other taxes, and paid over upon the order of the supervisor to the parties entitled thereto. (Amended by L. 1899, chap. 681 and L. 1904, chap. 478.)

In towns which have adopted the money system the commissioner of highways is required to perform the duties and exercise the powers specified in the above section, see Highway Law, § 53a, ante, p. 120, and notes thereunder. The notice to the occupant to cut weeds, brush and briers, and the overseer's report to the supervisor of the amount expended therefor, may be in the following forms:

FORM NO. 47.

Overseer's Report to Supervisor of Amount Expended Cutting Weeds.

To A. B., Supervisor of the Town of in the County of

The undersigned, overseer of highway district No., in said town, in accordance with section 71 of the Highway Law, hereby renders the following report:

The amount of money expended by me for cutting weeds, briars and brush within the bounds of the highway in said district, and the names of the owners and occupants of the several pieces or parcels of land against which said labor was performed, with a brief description of the same, are as follows:

NAME OF OWNER.	Name of Occupant.	Description of Premises.	Amount Expended

And in each case default was made by the occupant, after due notice had been given.

Dated this day of 19....

L. M.,

Overseer of Highway District No.

COUNTY OF
Town of } ss.

L. M., being duly sworn, says the foregoing report subscribed by him is true.

L. M.

Subscribed and sworn to before me,
this day of 19....

G. H.,

Justice of the Peace.

FORM NO. 48.

Notice to Occupant to Cut Weeds, Brush and Briars.

To R. S., Occupant of (briefly describe the premises), abutting on the Highway in Highway District No., in the Town of County of, N. Y.:

The undersigned, overseer (or commissioner) of highways of said district, hereby notifies and requires you to cut all weeds, briars and brush growing upon the above described lands within the bounds of said highway within ten days after the receipt of this notice; and if you fail to do so, I shall cause the same to be cut and make a report thereof pursuant to section 71 of the Highway Law.

Dated this day of 19....

L. M.,

Overseer of Highway District No.

(or commissioner of highways for town of)

§ 72. Abatement of tax for removal of fence.—Any inhabitant liable to a highway tax, who shall remove from lands owned

or occupied by him, the fence along any public highway, for the purpose of preventing the drifting of snow into such highway, shall be allowed by the overseer of highways, in abatement of his highway tax, the time actually expended in removing such fence, and in replacing the same, pursuant to the directions of the overseer of highways.

Fences causing snow to drift in the highways may be summarily removed, after notice to the owner, under the provisions of the Highway Law, § 53a (ante p. 120) and section 71 immediately preceding.

Wire fences may be purchased by a town if a proposition is adopted appropriating money therefor, to be erected along highways for the purpose of preventing snow blockades, see L. 1890, chap. 291, ante, p. 82.

§ 73. Abatement of tax for street lamps.—Any person or corporation owning or holding real estate, or other property liable to highway tax, except in the county of Kings, other than in cities and incorporated villages, who shall, with the consent of the overseer of highways in charge of the district in which such property is assessed, and in such places as he may direct, erect a street lamp, and cause the same to be properly attended to and kept burning during such hours of each night as the overseer of highways may direct, shall be allowed by the overseer of highways, in abatement of such highway tax, six dollars annually, or such portion of six dollars as the annual highway taxes upon such real estate or other property may be.

§ 74. Rebate of tax for using wagon tires of certain width.—Every person, who, during the year ending June first, eighteen hundred and ninety-three and each succeeding year thereafter, uses on the public highways of this state only wagons or vehicles with wheels upon which two or more horses are used the tire of which shall be not less than three inches in width, shall receive a rebate of one-half of his assessed highway tax for

each such year, not exceeding however in any one year the sum of four dollars or four days' labor; but no such rebate shall be allowed for the use of such wagons in a county where the board of supervisors, under the powers granted by section seventy-nine of the county law, have enacted a law forbidding the use of wagons on the highways having tires less than three inches in width. The right to such rebate shall not be affected by the use upon the public highways of buggies, carriages or platform spring wagons carrying a weight not exceeding one thousand pounds. Upon making an affidavit showing that he has complied with the provisions of this section during any such year, he shall be credited by the overseer of highways of the road district in which he resides or any road district where he is assessed with such rebate. Such affidavit may be taken before any overseer of highways who is hereby authorized to administer such oath. (Amended by L. 1904, chap. 324.)

Where a board of supervisors has enacted a law forbidding the use of wagons on the highways having tires less than three inches in width, the users of such wagons are not entitled to the rebate given by the above section. Section 79 of the County Law referred to in such section is as follows:—"Boards of supervisors may enact local and private laws regulating the width of tires used on vehicles built to carry a weight of 1,500 pounds or upwards, and may provide penalties for the violation thereof."

The affidavit as to the use of wide tires by taxpayers may be in the following form:—

FORM NO. 48.

Affidavit as to Use of Wide Tires.

State of New York. }
COUNTY OF } ss:

J. L., being duly sworn, deposes and says that he resides in highway district No., town of, county of; that he is assessed for days of highway labor in such district; that during the year ending June 1, 19...., he has only used upon the highways of this state wagons or vehicles drawn by two or more horses, the wheels of which are three or more inches in width, except buggies, carriages or platform spring wagons, carrying a weight of not more than

one thousand pounds; and that because of such use he is entitled to a credit upon such highway tax, as provided by § 74 of the Highway Law.

L. M.

Subscribed and sworn to before me,
this day of 19....

L. M.,

Overseer of Highways District No.

ARTICLE IV.

Laying Out, Altering and Discontinuing Highways, and Laying Out Private Roads.

- Section 80. Highways by dedication.
 81. Survey.
 82. Application.
 83. Application for commissioners.
 84. Appointment of commissioners, and their duties.
 85. Notice of meeting.
 86. Decision of commissioners in favor of application.
 87. Damages in certain cases, how estimated.
 88. Decision of commissioners denying application.
 89. Motion to confirm, vacate or modify.
 90. Limitation upon laying out highways.
 91. Laying out highways through burying grounds.
 92. Costs, by whom paid.
 93. Damages assessed, and costs to be audited.
 94. When officers of different towns disagree about highway.
 95. Difference about improvements.
 96. Highways in two or more towns.
 97. Laying out, dividing and maintaining highway upon town line.
 98. Final determination, how carried out.
 99. Highways abandoned.
 100. Highways by use.
 101. Fences to be removed.
 102. Penalty for falling trees.
 103. Fallen trees to be removed.
 104. Penalty for obstruction or encroachment.
 105. How removed, and liability for not removing.
 106. Private road.
 107. Jury to determine necessity, and assess damages.
 108. Copy application and notice delivered to applicant.
 109. Copy and notice to be served.
 110. List of jurors.
 111. Names struck off.
 112. Place of meeting.
 113. Jury to determine and assess damages.
 114. Their verdict.
 115. Value of highway discontinued.
 116. Papers to be recorded in town clerk's office.
 117. Damages to be paid before opening the road.
 118. Fees of officers.
 119. Motion to confirm, vacate or modify.
 120. Costs of new hearing.
 121. For what purpose private road to be used.
 122. Highway; or roads along division lines.
 123. Adjournments.

§ 80. Highways by dedication.—Whenever land is dedicated to a town for highway purposes therein, the commissioners of highways in such town may, either with or without a written application therefor, and without expenses to the town, make an order laying out such highway, upon filing and recording in the town clerk's office, with such order, a release of the land from the owner thereof. A highway so laid out must not be less than two rods in width. Section ninety of this chapter does not apply to a highway by dedication. Such commissioners of highways may also, upon written application and with the written consent of the town board, make an order laying out or altering a highway, or discontinuing a highway which has become useless since it was laid out, in their town, upon filing and recording in the town clerk's office, with such application, consent and order, a release from all damages from the owners of the lands taken or affected thereby, when the consideration for such release, as agreed upon between such commissioners and owners, shall not, in any one case, from any one claimant, exceed one hundred dollars, and from all claimants, five hundred dollars. An order of the commissioners as herein provided shall be final. (Amended by L. 1897, chap. 204, and L. 1904, chap. 387, in effect April 26, 1904).

Scope of section.—Although this section is entitled "Highways by dedication," it will be observed that it provides for two distinct methods of creating highways, first, by dedication and laying out, and second, by release of damages and laying out. The amendment of 1897 provided that a highway dedicated and laid out must not be less than two rods in width and that § 90, requiring highways to be at least three rods in width, shall not apply to such a highway. This was already the law as to highways in which the public had acquired a right by use. § 100. The provision as to width, however, does not apply to a highway laid out under the latter provisions of the section, viz: by release of damages. The amendment of 1904 provided that a highway may also be discontinued upon release of damages.

Manner of creating public highways.—Public highways may be created in four ways: (1). By proceedings under the statute; (2). By prescription, or where land is used by the public for a highway for twenty years, with the knowledge, but without the consent of the owner; (3). By dedication through offer and implied acceptance, or where the owner throws open his land intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment; (4). By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities in charge of the subject, formally, or in terms accept it as a highway. *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397.

Highways by dedication.—A highway may be formally dedicated as such by the owner of the land. When so dedicated, there must be proof of an acceptance by some formal and unambiguous action on the part of the local authorities having that power and showing unmistakably an intention to accept the land for such purpose. *People v. Underhill*, 144 N. Y. 316, 323. Or a highway may be impliedly dedicated by permitting the public to use the land as a highway, in which case the use ripens into an absolute and prescriptive right after the lapse of twenty years. § 100, post. There has been considerable discussion by the courts as to the character of the public use necessary to create a highway. In *Spier v. Town of New Utrecht*, 121 N. Y. 420, the court said: "The mere fact that a portion of the public travel over a road for twenty years cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The uses must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. Although the owner of land may not dedicate it for a public highway, and may not intend or assert that it shall become such, yet if he permits it to be used in the way just indicated for twenty years it would be deemed a public highway, and he will not be permitted to question the public right." This doctrine was followed and approved in *People v. Underhill*, 144 N. Y. 316 and *Palmer v. Palmer*, 150 N. Y. 139. The use by the public of a private way does not make it a public highway without proof of dedication by user. *Palmer v. Palmer*, supra. A dedication of a ¹ once made and accepted cannot be revoked.

Cook v. Harris, 61 N. Y. 448. But a dedication not accepted in a reasonable time may be recalled by the owner of the land; and he may at any time recall the dedication, if no adverse rights have attached; but where dedication is implied from user, it cannot be revoked after twenty years, regardless of acceptance, (§ 100, post), and the highway may be formally laid out under this section. *Buffalo v. D. L. & W. R. R. Co.*, 68 App. Div. 488; *Eckerson v. Haverstraw*, 6 App. Div. 102; *Matter of Fox Street*, 54 App. Div. 479.

Where a highway has been formally dedicated, acceptance is a question of fact. A formal resolution of the local authorities is unnecessary, but any official act on their part which treats it as a highway and shows an intention to adopt it as such is sufficient. *Matter of Hunter*, 163 N. Y. 542; *Flack v. Village of Green Island*, 123 N. Y. 107.

Order laying out highway upon dedication.—Whenever land is dedicated to a town for highway purposes, either formally or by user, the commissioner of highways may, either with or without a written application, make an order laying out such highway without expense to the town. The commissioners must cause a survey of such highway to be made and incorporate it in their order. § 81, post. The cost of making the survey is a town charge. Such order containing the survey must be filed and recorded in the town clerk's office, together with a release of the land from the owner. The order so made by the commissioners shall be final. § 80.

The application, dedication, release and order may be in the following form:

FORM NO. 49.

Application to Lay Out Highway on Dedication.

To the Commissioners of Highways of the Town of in the County of

The undersigned, liable to be assessed for highway labor in the town of hereby applies to you to lay out a highway in said town, commencing (describe the proposed highway), which proposed highway will pass through the lands of R. S. and T. W., who consent to the laying out of such highway.

Dated this day of 19....

L. M.

FORM NO. 50.

Dedication of Land for Highway; Release.

I, R. S., of the town of county of N. Y., for value received, hereby dedicate to the town of aforesaid, a strip of land across my premises in said town, for the purposes of a highway, described as follows: (Here describe premises dedicated.) And I also hereby release said town from all damages by reason of the laying out and opening of said highway.

In witness whereof, I have hereunto set my hand and seal, this
 (Seal.) day of 19....

R. S.

STATE OF NEW YORK, } ss:
 County of

On this day of 19..., before me, the subscriber,
 personally appeared R. S., to me known to be the person described in,
 and who executed the foregoing agreement.

G. H.,
 Justice of the Peace.

FORM NO. 51.

Order Laying Out Highway Upon Dedication.

At a meeting of the commissioners of highways of the town of in the county of on the day of 19..., for the purpose of deliberating on the propriety of laying out a highway in said town, hereinafter described, and on the application of L. M., a person liable to be assessed for highway labor in said town, and a release from the owners of the land through which the highway is proposed to be opened, having been given;

It is ordered and determined that a highway shall be, and the same is hereby laid out in said town as follows: Beginning (here insert the survey bill) and the line of survey shall be the center of the highway, which shall be rods in width.

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

The order laying out the highway must be signed by all the commissioners, where there are more than one in the town, or must show that they were all notified to participate. Fitch v. Commissioners, 22 Wend. 132; People v. Hynds, 30 N. Y. 470; People v. Williams, 36 N. Y. 441; Matter of Church St., 49 Barb, 455; Christy v. Newton, 60 Barb, 332; Chapman v. Swan, 65 Barb, 210; Pratt v. People, 13 Hun. 664.

Release, to be filed and recorded.—Before the highway commissioners take any proceedings to lay out for highway purposes the lands dedicated, they should file and record in the town clerk's office a release of the land from the owner thereof; but the court of appeals has held that where the owner of land petitioned for and consented to the alteration of a highway, which was wholly upon his farm, and personally closed a part of the road which was abandoned, and opened and worked the new part, the lack of a formal release did not render the order void so as to justify the invasion of the closed highway by persons having no rights except those common to the public. (Engleman v. Longhorst, 120 N. Y., 332.)

Where lands have been dedicated for highway purposes the highway commissioners may commence proceedings to lay out such highway without written application being made.

Fee, in whom vested.—The party who makes the dedication does not part with the title to such land. He retains the right to use the land in any way consistent with the use to which it is dedicated and the public acquires only the right of passage over such land and such rights and privileges as are incident to the right of passage.

Laying out, altering or discontinuing on release of damages where claims do not exceed \$500.—Section 80 also provides that the commissioners of highways may on written application and with the written consent of the town board, make an order laying out, altering or discontinuing a highway in their town, on filing and recording in the town clerk's office with such application, consent and order a release of all damages from the owner of lands, taken or affected thereby, when the consideration for such release, as agreed on between such commissioners and owners, does not, in any one case, from any one claimant, exceed one hundred dollars, and from all claimants, five hundred dollars. An order so made by the commissioners is final. (H. L., § 80.) Before making such order, the commissioners must cause a survey of such highway to be made and incorporate such survey in the order and it must be filed and recorded with the order. The expense of the survey is a town charge. The town clerk must note the time of recording the survey. (H. L., § 81.)

The following forms for the application, consent, release and order may be used:

FORM NO. 52.

Application to Lay Out or Alter a Highway, on Release of Damages.

To the Commissioners of Highways of the Town of , in the County of :

The undersigned, liable to be assessed for highway labor in the town of hereby applies to you to lay out (or alter) a highway in said town, commencing (describe), which proposed highway will pass through the lands of R. S. and T. W., who consent to the laying out (or altering) of such highway.

Dated this day of , 19....

L. M.

FORM NO. 53.

Application to Discontinue a Highway, on Release of Damage.

To the Commissioners of Highways of the Town of , in the County of :

The undersigned, liable to be assessed for highway labor in the town of hereby applies to you to discontinue the highway in said town commencing (describe highway), which highway passed

through the lands of R. S. and T. W., who consent to the abandonment
of such highway.

L. M.

Dated this day of 19....

FORM NO. 34.

Consent of Town Board to Lay Out, Alter or Discontinue a Highway.

The undersigned, the town board of the town of in the county of hereby consent that the commissioners highways of said town make an order laying out (or altering or discontinuing) the highway described in the application of L. M., pursuant section 80 of the Highway Law.

In witness whereof, we have hereunto set our hands on this day of 19....

(Signed by Each Member of Town Board.)

FORM NO. 35.

Release of Damages by Owners of the Land.

Know all men by these presents, that I, R. S., of the town of county of N. Y., for and in consideration of the sum (not exceeding \$100), hereby consent that a highway be laid out and opened (or altered) across my premises in the town of County of N. Y., pursuant to the application of L. M., dated the day of 19...., and release said town from all damages by reason of laying out and opening (or altering) such highway through my premises.

In witness whereof I have set my hand hereunto, on this day of 19....

R. S.

(Form may be readily modified where highway is to be abandoned.)

FORM NO. 36.

Order Laying Out or Altering a Highway With the Consent of Town Board.

At a meeting of the commissioners of highways of the town of in the county of on the day of 19...., for the purpose of deliberating on the propriety of laying out (or altering) a highway in said town, and upon the written application of L. M., a person liable to be assessed for highway labor in said town, and the written consent of the town board of said town having been given as prescribed by law, and releases from damages having been executed by the owners of the land through which the proposed highway is to be opened, copies of which are hereto annexed, the consideration paid to any one claimant for such damages, not exceeding \$100, and of all the claimants not exceeding \$500;

It is hereby ordered and determined that a highway shall be, and the same is hereby laid out in said town as follows: (Here insert survey bill.) And the line of survey shall be the center of the highway, which shall be rods in width.

Dated this day of 19....

A. B..

C. D..

E. F..

Commissioners of Highways.
(Form may be readily modified where highway is to be abandoned.)

The application, consent and order together with the written release from damages must be filed and recorded in the town clerk's office. The town clerk should note the time of recording these papers. The consideration for the release must not exceed the sum of one hundred dollars, and the total sum paid to all claimants must not exceed five hundred dollars. No such highway shall be laid out less than three rods in width. (H. L., § 90.)

§ 81. Survey.—Whenever the commissioners of highways shall lay out any highway, either upon application to them or otherwise, they shall cause a survey thereof to be made, and shall incorporate the survey in an order to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same.

Survey must be recorded.—Although this section requires the survey to be incorporated in the order, it is sufficient if it is referred to in the order, attached to it. *Van Bergen v. Bradley*, 36 N. Y., 316. And where the order referred to the survey and both were recorded in the same book at the same time, it was held sufficient. *McCarthy v. Whalen*, 19 Hun. 503. But in any event the survey must be included in the record in some form in connection with the order, so that it may be readily referred to for the purpose of locating the highway. *Pratt v. People*, 13 Hun. 664.

§ 82. Application.—Any person or corporation assessable for highway labor, may make written application to the commissioners of highways of the town in which he or it shall reside, or is assessable, to alter or discontinue a highway or to lay out a new highway.

Who may make application.—It is not necessary that the person who makes the application should be a resident of the town, but merely that the person or corporation shall be assessable for highway labor in the town. *Harrington v. People*, 6 Barb. 607; *New York, New Haven and H. R. R. Co. v. New Rochelle*, 29 Misc. 195, 200. The application may be made by a tenant, assessable for highway labor. If the application is made by a person who is not assessable for high-

way labor the proceedings are not for that reason void. *Marble v. Whitney*, 28 N. Y., 297. A person liable to be assessed for highway labor in one town may institute proceedings to lay out a highway partly in his own town and partly in another town. *People ex rel. Knapp v. Keck*, 90 Hun, 499. Residents of a village within a town are not entitled to make the application. *Commissioners v. Meserole*, 10 Wend, 123. Persons exempt from poll tax for highway labor are not proper parties to make such application, unless they own or occupy property in the town where such highway is or is to be located which is assessed for highway labor. (For enumeration of persons exempt from poll tax, see p. 91.)

Commissioners may act on own motion.—While a commissioner of highways as such may not make application to lay out a highway (*People v. Supervisors*, 82 Hun. 298), it is not necessary to the valid laying out of a highway that there should be a written application; the commissioner may act on his own motion. *McCarthy v. Whalen*, 19 Hun. 503, aff'd. 87 N. Y. 148; *Gould v. Glass*, 19 Barb, 179; *People v. Supervisors of Richmond*, 20 N. Y. 252.

Form of application.—The application to lay out, alter or discontinue may be in the following forms, respectively:

FORM NO. 57.

Application to Lay Out a Highway.

To the Commissioner of Highways of the Town of in the County of:

The undersigned, an inhabitant of said town of, liable to be assessed for highway labor therein, hereby applies to you to lay out a highway in said town, commencing (describe the proposed highway), which proposed highway will pass through the lands of R. S. and T. W. (who consent to the laying out of the highway, or as the case may be).

Dated this day of, 19....

L. M.

FORM NO. 58.

Application to Alter a Highway.

To the Commissioner of Highways of the Town of in the County of:

The undersigned, an inhabitant of said town of, liable to be assessed for highway labor therein, hereby applies to you to alter the highway leading from to, in said town as follows:

(Insert particular description of the proposed alteration by courses and distances.) The proposed alteration passes through the lands of R. S. and T. W. (who consent to the proposed alteration, or as the case may be).

Dated this day of, 19....

L. M.

FORM NO. 59.

Application to Discontinue a Highway.

To the Commissioners of Highways of the Town of , in the County of ;

The undersigned, an inhabitant of said town of , liable to be assessed for highway labor therein, hereby applies to you to discontinue the old highway beginning (insert description), on the ground that said highway has been abandoned.

Dated this day of , 19....

L. M.

§ 83. Applications for commissioners.—Whenever the land is not dedicated to the town for highway purposes, and not released as herein provided, the applicant shall, within thirty days after presenting the application to the commissioners of highways, and after at least five days' notice to said commissioners of the time and place of the application to the county judge or special county judge, in this section provided for, by verified petition showing the applicant's right to so present the same, and that such application has been in good faith presented, and if the judge require on such notice to such parties interested as he shall direct, apply to the county judge or special county judge, of the county where such highway shall be, for the appointment of three commissioners to determine upon the necessity of such highway proposed to be laid out or altered, or to the uselessness of the highway proposed to be discontinued and to assess the damages by reason of the laying out, opening, altering or discontinuing such highway. Such application shall be accompanied by the written undertaking of the applicant executed by one or more sureties, approved by the judge, to the effect that if the commissioners appointed determine that the proposed highway or alteration is not necessary or that the highway proposed to be discontinued is not useless, the sureties will pay to the commissioners their compensation at the rate of four dollars for each day necessarily spent and all costs and expenses necessarily incurred in the performance of their duties, which amount shall not

exceed the sum of fifty dollars. (Amended by L. 1894, chap. 334; L. 1897, chap. 344; L. 1904, chap. 353, in effect April 16, 1904.)

Amendments to section.—The amendment of 1894 added the provision requiring an undertaking for the compensation of the commissioners and their expenses. The amendment of 1897 reduced such compensation from six dollars to four dollars per day. The amendment of 1904 authorizes the application to be made either to the county judge or special county judge, instead of the county court, as heretofore.

Instituting proceedings.—This and the following sections are designed to point out the initiatory steps in all proceedings to lay out a new highway. *Matter of Taylor and Allen*, 8 App. Div. 395. The statute must be strictly complied with. *People ex rel. Scrafford v. Stedman*, 57 Hun. 280.

Sufficiency of application.—The statute contemplates that an application shall first be made to the highway commissioner, and that within 30 days thereafter application shall be made to the county judge or special county judge for the appointment of commissioners. *People ex rel Knapp v. Keck*, 90 Hun. 497; *People ex rel Smith v. Allen*, 37 App. Div. 248. But it does not require that the application shall contain affirmative allegations that the land proposed to be taken has not been dedicated to the town for highway purposes, or has not been released by the owner for that purpose, or that it has been made within 30 days after its presentation to the commissioners of highways, and the failure of the applicant to allege such facts does not deprive the judge of jurisdiction to entertain the proceeding. *Matter of Buell*, 168 N. Y. 423.

Form of application.—The application must be presented by the person or persons making the original application to the highway commissioners and within thirty days after such original application was so presented. The application must be in the form of a verified petition and should show:

1. That the petitioner is a person liable to be assessed for highway labor in the town where the application is made.
2. The previous application to the commissioners.
3. That the application has been presented in good faith.
4. That the highway commissioners have not laid out such highway.

1. The petition and verification may be in the following form:

FORM NO. 60.

Application for Appointment of Commissioners.

In the Matter
of the
Application of L. M. to lay out (alter
or discontinue) a highway in the
town of and the
assessment of damages therefor.

The petition of L. M., of the town of in said county, respectfully shows that your petitioner is a person liable to be assessed for highway labor in the town of said county; that on the day of 19...., he presented an application in writing to the commissioners of highways of said town as follows: (Insert copy of application to the commissioners.) That said application was in good faith made; that the commissioners of highways have not laid out (altered or discontinued) said highway pursuant to section 80 of the highway law; that the lands have not been dedicated for the purpose of such highway by the owners thereof, nor have such lands been released by such owners for such purpose.

Wherefore, your petitioner prays that three commissioners be appointed pursuant to section 84 of the Highway Law, to determine upon the necessity of the proposed highway (or altering or discontinuing the said highway), and to assess the damages by reason of laying out and opening (or altering or discontinuing) such highway.

Dated this day of 19....

L. M.

STATE OF NEW YORK, } ss.
County of

L. M., being duly sworn, says he has read the foregoing petition by him subscribed, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

L. M.

Subscribed and sworn to before me,
this day of 19....

G. H.,
Justice of the Peace.

Undertaking and expenses.—Since 1894, the applicant has required to give an undertaking to pay the compensation and expenses of the commissioners. It is insufficient unless approved by the judge before whom the proceeding is instituted. *Matter of Fanning*, 26 App. Div. 627; 50 N. Y. Supp. 1126. The intent of the section is, if the proposed improvement should be carried out, the town shall pay the costs and expenses, but if the determination is adverse the expenses shall be borne by the applicant. Thus in *Matter of Miller*, 9 App. Div. 260, 41 N. Y. Supp. 581, it was held unless there is a valid assessment of damages, the town cannot be made responsible for the fees of the commissioners, no matter what may have prevented the carrying out of the proposed improvement. The limit of

the sum chargeable to the applicant is \$50, and where this amount has been paid as costs of the adverse party, the applicant cannot be compelled to pay the compensation of the commissioners. *Patton v. Miller*, 28 App. Div. 517; 51 N. Y. Supp. 202.

Form of undertaking.—The undertaking may be in the following form:

FORM NO. 61.

Undertaking to Pay Expenses of Commissioners of Assessment.

Whereas L. M., of the town of , in the county of , has on this day of , 19.... , applied to the county judge (or special county judge) of the county of , in pursuance of § 83 of the Highway Law, for the appointment of commissioners to determine upon the necessity of laying out a proposed highway (or altering a highway) (or to determine the uselessness of a highway proposed to be discontinued), and to assess the damages by reason thereof; now, therefore we, the said L. M., as principal, and A. B. and C. D., of the town of , his sureties, do hereby, pursuant to § 83 of the Highway Law, jointly and severally undertake, that if the commissioners appointed determine that the proposed highway (or alteration) is not necessary (or that the highway proposed to be discontinued is not useless), we will pay to the said commissioners their compensation at the rate of four dollars per day for each day necessarily spent and all costs and expenses necessarily incurred in the performance of their duties, not exceeding in the aggregate the sum of fifty dollars.

Dated this day of , 19.... .

L. M.
A. B.
C. D.

Acknowledgment.

STATE OF NEW YORK, }
County of } ss.:
Town of }

On this day of , 19.... , before me, the subscriber, personally appeared L. M., A. B. and C. D., to me personally known to be the same persons mentioned in, and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

G. H.,
Justice of the Peace.

JUSTIFICATION OF SURETIES

STATE OF NEW YORK, } ss.:
County of }

A. B. and C. D., the sureties mentioned in the foregoing undertaking, being severally duly sworn, each for himself says, that he is a resident and freeholder (or householder) within this State, and is worth dollars over and above all debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale on execution.

A. B.,
C. D.

Subscribed and sworn to before me, }
this day of , 19.... }

—H.—
—ace.

APPROVAL BY JUDGE

I hereby approve of the foregoing undertaking, and of the sufficiency
of the sureties therein named.

E. F. County Judge (or Special County Judge).

§ 84. **Appointment of commissioners and their duties.**—Upon the presentation of such petition, the county judge or special county judge must appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, and who shall not be related by consanguinity or affinity within the sixth degree, to the applicant or to any person interested in the proceeding or to the owner of any lands, to be taken or affected by the laying out, alteration or discontinuance of a highway, as commissioners to determine the questions mentioned in the last section. They shall take the constitutional oath of office, and appoint a time and place at which they shall all meet to hear the commissioners of highways of the town where such highway is situated, and others interested therein. They shall personally examine the highway described in the application, hear any reasons that may be offered for or against the laying out, altering or discontinuing of the highway, and assess all damages by reason thereof. They may adjourn the proceedings before them from time to time, issue subpoenas and administer oaths in such proceedings, and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them upon the subject of the assessment of damages. They shall make duplicate certificates of their decision, and shall file one in the town clerk's office of the town, and the other, with such minutes and evidence, in the county clerk's office of the county in which the highway or proposed highway is located. (Amended by L. 1904, chap. 353, in effect April 16, 1904.)

Amendment of section.—The amendment of 1904 merely conforms the section to the amendment made to § 83, authorizing the county judge or special county judge to entertain the application.

Form of order of appointment.—The order appointing the commissioners may be in the following form:

FORM NO. 62.

Order Appointing Commissioners.

(Title as in Form No. 60.)

On reading and filing the petition of L. M., of the town of in said county, dated the day of 19...., praying for three commissioners to be appointed, pursuant to section 84 of the Highway Law, to certify as to the necessity of laying out and opening (altering or discontinuing) a highway beginning (insert the description) and to assess the damages by reason of laying out (altering or discontinuing) such highway.

It is hereby ordered that S. S., G. G. and J. J., of the town of said county, be, and they are hereby appointed as such commissioners.

Service of notice of appointment.—The applicant should serve the following notice, together with a copy of the order appointing them, on the persons appointed commissioners by the court

FORM NO. 63.

Notice to Commissioners of Their Appointment.

To S. S., G. G. and J. J.:

Take notice, that you and each of you have been duly appointed commissioners, by an order of the county court, a copy of which is hereto annexed, and you are hereby required to fix a time and place at which you will all meet to hear the commissioners of highways and all other persons interested in the highway mentioned in the said order.

Dated this day of 19....

L. M.

Oath of commissioners.—Before entering upon their duties such commissioners must each take the following oath:

FORM NO. 63a.

Oath of Commissioners.

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of commissioners to lay out, alter or discontinue a highway (as the case may be) according to the best of my ability."

The taking of such oath is necessary to give the commissioners jurisdiction, and the parties to the proceeding have no right to waive such an omission because the whole town has an interest in the proceeding. People v. O'Connor, 46 Barb. 333.

Place of meeting.—The hearing may be had at any place in the town where the highway or proposed highway is located, but it is usual for the commissioners to meet as near to where the highways proposed to be laid out or discontinued are located, as possible. Matter of Coe, 19 Misc. 549, 551· 44 N. Y. Supp. 910.

Proceedings of commissioners.—Such commissioners must appoint a time and place at which they will all meet to hear the commissioners of highways of the town where such highway is situated and other persons interested in the highway. Owners of land affected by the discontinuance of a highway, although their land does not abut are entitled to be heard in opposition to a proceeding for discontinuance. Matter of Coe, 19 Misc. 549; 44 N. Y. Supp. 910. Such meeting shall not occur until at least eight days after their appointment. A meeting at which only two of such commissioners attend is a legal meeting. The commissioners must personally examine the highway described in the application and hear any reasons that may be offered for or against the laying out, altering or discontinuing of such highway and assess all damages by reason thereof. They may adjourn the proceedings before them, from time to time, (Matter of Newland Ave. 15 N. Y. Supp. 63; 38 St. Rep. 796), and issue subpoenas and administer oaths in such proceedings. (Code Civ. Pro. §§ 854-862.)

The subpoena may be in the following form:

FORM NO. 64.

Subpoena of Witness Before Commissioners.

The People of the State of New York to L. L. and O. O.:

You and each of you are hereby commanded to be and appear before us, commissioners appointed by the county court of county, at the, in the town of, on the day of, 19..., at o'clock in the noon, to testify and give evidence in the matter of laying out (altering or discontinuing) a highway and assessing the damages therefor, in the town of then and there to be heard and determined.

Dated this day of, 19....

A. A.,

B. B.,

D. D.,

Commissioners.

The following oath should be administered to witnesses:

FORM NO. 65.

Oath to Witnesses.

You do solemnly swear that the evidence you shall give touching the necessity of laying out (altering or discontinuing) the highway in que-

tion, and assessing the damages therefor (or as the case may be), shall be the truth, the whole truth and nothing but the truth, so help you God.

Such commissioners must keep minutes of their proceedings and reduce to writing all oral evidence given before them on the subject of the assessment of damages. The statute does not contemplate that commissioners appointed in such proceedings shall be governed by technical rules of evidence applied in courts of record. *Matter of Pugh*, 22 Misc. 43; 49 N. Y. Supp. 398. They must make duplicate certificates of their decision, and file one in the town clerk's office of the town. The other certificate, together with the minutes and evidence taken by them, must be filed in the county clerk's office of the county in which the highway or proposed highway is located. (For form of certificate, see Form No. 68.) Each commissioner is entitled to four dollars and his necessary expenses for each day he is necessarily employed as such commissioner. (H. L., §§ 84, 92.)

§ 85. Notice of meeting.—The applicant shall cause, at least eight days previous, written or printed notice to be posted up in not less than three public places in the town specifying, as near as may be, the highway proposed to be laid out, altered or discontinued, the tracts or parcels of land through which it runs, and the time and place of the meeting of the commissioners appointed by the county court to examine the highway as mentioned in the last section. Such notice shall also, in like time, be personally served on the owner and occupant of the land, if they reside in the town, or by leaving the same at their residence with a person of mature age; if they do not reside in the same town, or service can not be made, a copy of such notice shall be mailed to such owner and occupant, if their post office address is known to the applicant or ascertainable by him upon reasonable inquiry.

Necessity of notice.—Notice is necessary to give the commissioners jurisdiction to act; and an order laying out a road without the notice is void for want of jurisdiction. (*People ex rel. Odle v. Kniskern*, 54 N. Y. 53; *People ex rel Wells v. Brown*,

47 Hun, 459.) The failure to serve a notice upon the owners of lands through which a proposed highway is to be laid out is fatal to the proceedings, so far as the property of such owners and occupants is concerned. *People ex rel. Smith v. Allen*, 37 App. Div. 248; 55 N. Y. Supp. 1057.

Such notice must specify, as near as possible, the highway proposed to be laid out, altered or discontinued, and the tracts or parcels of land through which it runs, and the time and place of the meeting of the commissioners appointed to examine the highway. The notice need not specify courses and distances. It should give the termini and general route of the proposed road. The notice is not vitiated because erroneously stating that some of the lands were unimproved. *Snyder v. Trumperdour*, 38 N. Y. 355.

Want of notice is an irregularity which may be made the ground of a writ of certiorari to review the action of commissioners in laying out a highway. *People ex rel. Scrafford v. Stedman*, 57 Hun. 280.

Form of notice.—The notice may be in the following form:

FORM NO. 66.

Notice of Meeting of Commissioners.

Notice is hereby given that the undersigned has made application to the commissioners of highways of the town of in the county of for the laying out (altering or discontinuing) of a highway in said town, commencing (here insert description as in application) which proposed highway (or alteration) will pass through the lands of (describe who), and by an order of the county court dated the day of 19.... S. S., G. G. and J. J. were appointed commissioners to certify as to the necessity of said proposed highway (alteration or discontinuance), and to assess the damages by reason of the laying out and opening (alteration or discontinuance) of such highway; and that said commissioners will all meet at in said town, on the day of 19.... at o'clock in the noon, to examine the proposed highway (or the highway) and hear the commissioners of highways and all others interested therein, and to assess the damages if such highway be determined to be necessary (or is altered or discontinued).

Dated this day of 19....

L. M.

Form of affidavit of service.—The following affidavit of service should be made:

FORM NO. 67.

Affidavit of Service of Notice.

STATE OF NEW YORK, } ss.
County of }

L. M., being duly sworn, says that he caused notices in writing, of which the within is a copy, to be posted up at at

and three public places in the town of said county, on the day of 19...., and that he served a like notice on (name all the owners and occupants of the lands through which the highway is proposed to be laid out, (altered or discontinued) on the day of 19...., by (state how served), and that said notices were posted at the respective places, and served on the respective persons herein named, at least eight days before the time specified therein for the meeting of said commissioners.

L. M.

Subscribed and sworn to before me, }
this day of 19.... }
G. H.,
Justice of the Peace.

§ 86. Decision of commissioners in favor of application.—If a majority of the commissioners appointed by the county court shall determine that the highway or alteration applied for is necessary, or that the highway proposed to be discontinued is useless, they shall assess all damages which may be required to be assessed by reason thereof and make duplicate certificates to that effect. If the petition is for the laying out of a highway, the commissioners shall also include in their certificates what the probable cost would be of laying out and completing the proposed highway, in their opinion, based upon the evidence given before them on the hearings. (Amended by L. 1901, chap. 441, in effect April 20, 1901.)

Amendment of section.—The amendment of 1901 added the last sentence requiring a statement of the probable cost to be inserted in the certificate.

Damages.—The damages must be presumed to be coextensive with the use to which the highway is to be put. *Griffin v. Martin*, 7 Barb. 297. They are in the judgment of the commissioners, and their award will not be set aside as against the weight of evidence. *Matter of Pugh*, 22 Misc. 43; *matter of Whitestown*, 24 Misc. 150. The measure of damages is the present market value of the property. *Matter of William street*, 19 Wend, 678. In assessing the damages the commissioners should determine the effect of the proposed change upon the market value of the property, the market value of the premises before the change and what their market value will be after the change. The question is not what estimate the owner places upon the lands, but what their real worth is in the judgment of honest, competent and disinterested men. (In the

matter of Furman street, 17 Wend., 649.) In estimating the damages to be assessed, the value of the land taken is not restricted to its agricultural or productive qualities. Every purpose for which the property might be used should be considered and the compensation made should equal the damage sustained. Remote, contingent or speculative damages should not be considered by the commissioners, but they are not confined in making their appraisal to the actual value of the land to be taken, but may consider how the laying out and opening of the road will affect the remainder of the owner's land. If the remainder is left in an inconvenient and unmarketable shape, that fact may be considered in determining the compensation. (Albany Northern R. R. Co. v. Lansing, 16 Barb., 68.) If the claims of title to lands damaged are conflicting, damages may be awarded to "owners unknown." Matter of Eleventh Ave. 49 How. Pr. 208. Where an award was made to the husband of an owner, the proceeding was not invalidated. Mitchell v. White Plains, 16 N. Y. Supp. 828. The proper method is of course to insert in the certificate the names of the property owners and the amount of damages awarded to each; but if the property owners are merely described without being named, it has been held sufficient. Granger v. Syracuse, 38 How. Pr. 308. An offer to release which was not accepted does not justify the commissioners in awarding merely nominal damages. Matter of Terrace, 15 N. Y. Supp. 775. Where the property is leased, separate awards should be made to both lessor and lessee, but if lessor is awarded the entire sum, the lessee may recover of the lessor his proportionate share. Coutant v. Catlin, 2 Sand. Ch. 485. The value of a leasehold interest and the damages to be awarded must depend upon the location and business facilities of the property and the state of trade in the vicinity. Matter of Commissioners, 54 Hun, 313.

Determination of commissioners.—The determination of the commissioners must be confined to the highways applied for, but they are not limited to the precise route specified in the application. They may make such variations as they deem proper. The general course of the road, however, must be preserved. In the assessment of damages the benefits derived from the exclusive use of lands reverted by reason of the discontinuance of another highway through other portions of the same person's land, must be deducted. § 87, post.

To authorize the discontinuance of a highway, the weight of evidence must show and the commissioners must find that it is useless; but a finding that it is not necessary, or that a proposed

new road would be better is sufficient. Matter of Coe, 19 Misc. 549; 44 N. Y. Supp. 910.

The certificate which the commissioners are required to make will sufficiently conform to the statute, if, in the description of the highway, a single line is given with the courses and distances. Inasmuch as the highway is required to be three rods in width, an order laying out a road is sufficiently explicit if it specifies the central line. The certificate of the commissioners will be sufficient if it state where the highway commences and where it ends, and its route by courses and distances. It is advisable, however, that all the bounds and width, as well as the courses, be particularly stated, to avoid uncertainty and controversy. The certificate must be made in duplicate, one of which must be filed in the town clerk's office and the other with the minutes and evidence taken by the commissioners in the county clerk's office. § 84, ante.

Form of Certificate.—The certificate may be in the following form:

FORM NO. 68.

Certificate of Decision of Commissioners in Favor of Application.

The undersigned, by an order of the county court of county, dated the day of 19...., on the application of L. M., having been appointed commissioners to certify as to the necessity of laying out and opening (altering or discontinuing) a highway in the town of in said county, beginning (describe highway as in the application) which proposed highway (or highway) crosses the lands of (name the persons) and to assess the damages to be caused thereby; now, therefore, we, the said commissioners, having given due notice of the time and place at which we would meet, and all having met at in said town on the day of 19...., pursuant to such notice, and having taken the constitutional oath of office, and on proof of the service and posting of the notices by the applicant, pursuant to section 85 of the highway law, having viewed the proposed highway (or alteration or highway proposed to be discontinued) and the lands through which it is proposed to be laid out and opened (altered or discontinued) and having heard all the allegations of the commissioners of highways and the parties interested therein, and the evidence of all the witnesses produced, do thereupon certify, that in our opinion it is necessary and proper that the highway be laid out and opened (altered or discontinued) pursuant to the said application of L. M., dated the day of 19....; and we have assessed the damages required to be assessed by reason of laying out and opening (altering or discontinuing) such highway as follows:

The damages of N. N. at \$.....; the damages of W. W. at \$.....
Dated this day of 19....

S. S.,
G. G.,
J. J.,
Commissioners.

§ 87. Damages in certain cases, how estimated.—The owner of lands within the bounds of a highway discontinued may in-

close the same and have the exclusive use thereof, and the benefits resulting therefrom may be deducted in the assessment of damage caused by the laying out of a highway through his other lands in place of the discontinued highway.

See notes to preceding section.

§ 88. Decision of commissioners denying application.—If a majority of the commissioners appointed by county court shall determine that the proposed highway or alteration is not necessary, or that the highway proposed to be discontinued is not useless they shall make duplicate certificates to that effect. The costs and expenses necessarily incurred by such commissioners in the proceedings shall be indorsed upon such duplicate certificates, and upon a confirmation of such decision and of the amount of such costs and expenses by the county court, such costs and expenses not exceeding fifty dollars shall be payable by the applicants. (Amended by L. 1894, chap. 334.)

Amendment of section.—The amendment of 1894 added the last sentence.

Certificate; form.—The commissioners must make duplicate certificates of their decision, one of which must be filed in the town clerk's office, and the other with the minutes and evidence taken by them in the county clerk's office. Such certificate may be in the following form:

FORM NO. 69.

Certificate of Decision of Commissioners Denying Application.

The undersigned, by an order of the county court of county, dated the day of 19...., on the application of L. M., having been appointed commissioners to certify as to the necessity of laying out and opening (altering or discontinuing) a highway in the town of in said county, beginning (describe highway as in the application) which proposed highway (or highway) crosses the lands of (name the persons) and to assess the damages to be caused thereby; now, therefore, we, the said commissioners, having given due notice of the time and place at which we would meet, and all having met at in said town on the day of 19.... pursuant to such notice, and having taken the constitutional oath of office, and on proof of the service and posting of the notices by the applicant, pursuant to section 85 of the highway law, having viewed the proposed highway (or alteration or highway proposed to be discontinued) and the lands through which it is proposed to be laid out and

opened (altered or discontinued) and having heard all the allegations of the commissioners of highways and the parties interested therein, and the evidence of all the witnesses produced, do thereupon certify, that in our opinion such highway, or alteration or discontinuance, is unnecessary and improper and should not be laid out (or should not be made, or such highway should not be discontinued).

Dated this day of 19....

S. S.,
G. G.,
J. J.,
Commissioners.

Costs and expenses.—The liability of an unsuccessful applicant cannot exceed \$50, and where an applicant has paid that amount as costs to the adverse party, the commissioners cannot recover their per diem fees of him. *Patton v. Miller*, 28 App. Div. 517; 51 N. Y. Supp. 202. An undertaking must be given by the applicant to secure his liability for such costs and expenses. § 83, ante.

§ 89. Motion to confirm, vacate or modify.—Within thirty days after the decision of the commissioners shall have been filed in the town clerk's office, any person interested in the proceeding may apply to the court if in session or to the county judge or special county judge, appointing the commissioners for an order confirming, vacating or modifying their decision, and such court or judge may confirm, vacate or modify such decision. If the decision be vacated, the court or judge may order another hearing of the matter before the same or other commissioners. If no such motion is made, the decision of the commissioners shall be deemed final. Such motion shall be brought on upon the service of papers upon adverse parties in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein; and the decision of the county court or judge shall be final, excepting that a new hearing may be ordered as herein provided, and excepting that any such decision may be reviewed on appeal upon questions affecting jurisdiction, and rulings and exceptions made and taken upon the hearing before the commissioners. If the final decision be adverse to the applicant, no other application for laying out, altering or discontinuing the same highway shall

be made within two years. (Amended by L. 1895, chap. 716; L. 1899, chap. 703 and L. 1904, chap. 353, in effect April 16, 1904).

Amendments of section.—The amendment of 1904 merely amended the section to conform to the amendment made to § 83 allowing the application to be made to the county judge or special county judge instead of the county court.

Who may make motion.—A resident taxpayer liable to assessment in the town for highway labor is a "person interested in the proceeding" within the meaning of this section, and may make the motion to confirm, vacate or modify the decision of the commissioners. *Matter of Coe*, 19 Misc. 549, 550; 44 N. Y. Supp. 910; *People ex rel. Ridgway v. Cortelyou*, 36 Barb. 164; *People ex rel. Banner v. Temple*, 27 Hun. 128.

When motion to be made.—The purpose of this section was to allow interested parties who desired to apply to the court for an order vacating or modifying the decision of the commissioners the period of thirty days within which to institute the application or motion. It does not require the application or motion to be actually heard within that time. *Matter of Glen-side Woolen Mills*, 92 Hun. 188; 36 N. Y. Supp. 593.

Form of notice of motion to confirm decision.—The notice of motion may be in the following form:

FORM NO. 70.

Notice of Motion to Confirm Decision.

COUNTY COURT.—.....COUNTY.

In the Matter of the Application of L. M. to Lay Out (Alter or Discontinue) a Highway in the Town of , and the Assessment of Damages Therefor.

To N. M. and W. W.:

Take notice that an application will be made to this court at a term thereof, to be held at the in the of , on the day of , 19.... for an order confirming the decision of the commissioners in the above entitled matter, which decision is dated the day of , 19...., and for such other and further relief as to the court may seem proper; that said application will be made upon said decision and upon the affidavits and papers, with copies of which you are herewith served.

Dated this day of , 19....

L. M.

Powers of court or judge.—The provision of the constitution, Art. I., § 7, requiring that compensation for property taken for a public use shall be ascertained by a jury, or by three commissioners appointed by a court of record, precludes the court or judge from modifying the decision of the commissioners as to

the amount of damages awarded. *People ex rel. Hanford v. Thayer*, 88 Hun. 137, 140; 34 N. Y. Supp. 592. Nor can the court or judge modify the decision so as to change the width of the highway laid out by the commissioners. *Matter of Feeney* 20 Misc. 272, 274. The court or judge may appoint successive commissioners until satisfied that the statute has been complied with. *Schneider v. Rochester*, 90 Hun. 171. The county court cannot, however, arbitrarily set aside an award made by commissioners, unless some error of law is plainly manifest. The commissioners in assessing damages are to be guided by their own judgment, as they view the premises and can better estimate the amount of damages sustained. For the court to arbitrarily set aside their award would be to usurp the functions conferred upon them by the statute. *Matter of Carpenter*, 11 Misc. 69; 32 N. Y. Supp. 826; *Matter of Feeney*, 20 Misc. 272; 45 N. Y. Supp. 830.

Form of order confirming decision.—If the county court confirm the decision of the commissioners, the order may be made in the following form:

FORM NO. 71.

Order of Court Confirming Decision.

At a term of the County Court, held at the
in the of on the day of 19....
Present—Hon. E. E., county judge.

COUNTY COURT—..... COUNTY.

In the Matter of the Application of L. M. to Lay Out (Alter or Discontinue) a Highway in the Town of and the Assessment of Damages Therefor.

On reading and filing the decision of the commissioners, S. S., G. G. and J. J., in the above entitled matter, dated the day of 19...., by which it appears (state substance of decision), with proof of due service upon N. N. and W. W. of notice of this application and (state other papers), and on motion of A. D., counsel for L. M., after hearing B. B., counsel for N. N. and W. W., opposed, and on reading (name the papers), it is hereby ordered that the said decision be and the same is hereby confirmed.

E. E.
County Judge.

Form of notice of motion to vacate or modify decision.—If the application be to vacate or modify the decision of the commissioners appointed by the court, the following notice should be served on the adverse parties at least eight days before motion is made:

FORM NO. 72.

Notice of Motion to Vacate or Modify Decision of Commissioners.

COUNTY COURT—..... County.

In the Matter of the Application of L. M. to Lay Out (Alter or Discontinue) a Highway in the Town of and the Assessment of damages therefor.

To N. M. and W. W.:

Take notice that an application will be made to this court at a term thereof to be held at the in the of on the day of 19...., for an order vacating (modifying or correcting, in the following particulars stating them) the decision of the commissioners in the above entitled matter, which decision is dated the day of 19...., with costs on this motion, and such further relief as the court may deem proper. That such application will be made upon said decision and the affidavits and papers, with copies of which you are herewith served.

Dated this day of 19....

L. M.

Form of order vacating or modifying decision of commissioners.—If the court vacate or modify the order of such commissioners the following order should be made by the court:

FORM NO. 73.

Order Vacating or Modifying Decision of Commissioners.

At a term of the County Court, held at the in the of on the day of 19....

Present—Hon. E. E., county judge.

In the Matter of the Application of L. M., to Lay Out (Alter or Discontinue) a Highway in the Town of and the Assessment of Damages therefor.

On reading and filing the decision of the commissioners S. S., G. G. and J. J. in the above entitled matter, dated the day of 19...., by which it appears (state the substance of decision), with proof of due service upon N. N. and W. W. of notice of this application and (state other papers), and on motion of A. D., counsel for L. M., after hearing E. E., counsel for N. W. and W. W. opposed, and on reading (name the papers), it is hereby ordered that the said decision be and the same is hereby vacated (or modified or corrected as follows: State how; or that a new hearing be had before the same or other commissioners to be named herein), with \$..... costs of this motion to against

E. E.,
County Judge.

If the decision be vacated, the court may order another hearing of the matter before the same or other commissioners. § 89.

Costs on motion.—Costs of a motion to confirm, vacate or modify the report of the commissioners may be allowed in the discretion of the court or judge, not exceeding fifty dollars. § 152, post.

Right to Appeal from order.—The provision of § 89 that the decision of the court or judge "shall be final" is to make the decision conclusive upon the questions of the necessity of the proposed highway and the compensation of the land owner, subject however to the limitation that the court has jurisdiction. The decision is therefore appealable only on questions of the power and jurisdiction of the court or judge. *Matter of De Camp*, 151 N. Y. 557; *People ex rel. D., L. & W. R. R. Co. v.*

County Court, 4 App. Div. 542, aff'd 152 N. Y. 214. The order of confirmation cannot be reviewed by certiorari. *Id.* See also on right to appeal. *Matter of Barrett*, 7 App. Div. 482; 40 N. Y. Supp. 266; *matter of Taylor and Allen*, 8 App. Div. 395; 40 N. Y. Supp. 839.

Certiorari.—An order appointing commissioners is not subject to review by certiorari. *People ex rel. Hanford v. Thayer*, 88 Hun. 136; 34 N. Y. Supp. 592. See also *Matter of Lawton*, 22 Misc. 426.

Final order of highway commissioners laying out highway.—If the application be to lay out a highway, and the commissioners appointed by the county court decide that such proposed highway is necessary and proper and should be laid out and opened, and their decision has been confirmed by the county court; or where the decision of such commissioners is final and no motion has been made to confirm, vacate or modify it, the commissioners of highways should lay out such highway in accordance with such decision, by filing and recording in the town clerk's office, the following final order:

FORM NO. 74.

**Final Order of Highway Commissioners Laying Out Highways
After Contest.**

Whereas, L. M. did present to us as commissioners of highways of the town of , in the county of , a written application dated the day of , 19.... , to lay out a highway in said town; and, whereas, commissioners were appointed by the county court of said county, pursuant to section 84 of the highway law, and after having duly met, certified that such proposed highway was necessary and proper and should be laid out and opened, and assessed the damages therefor; and the said court having confirmed the decision of said commissioners (or no motion having been made to the county court to confirm, vacate or modify such decision) which said application, orders and certificate (or other papers) were duly filed in the office of the town clerk of said town, to which reference is here made.

Now, therefore, we, the undersigned commissioners of highways of said town, pursuant to section 89 of the highway law, do hereby lay out such highway as so applied for and ordered, whereof a survey has been made as follows: Beginning (here insert survey bill) and the line of such survey shall be the center of the highway, which is to be rods in width.

Dated this day of , 19.... .

A. B.
C. D.
E. F.
Commissioners of Highways.

§ 90. Limitations upon laying out highways.—No highways shall be laid out less than three rods in width, nor through an

orchard of the growth of four years or more, or any garden cultivated as such for four years or more, or grape vineyard of one or more years growth, and used in good faith for vineyard purposes, or buildings, or any fixtures or erections for the purposes of trade or manufactures, or any yard or inclosure necessary to the use and enjoyment thereof, without the consent of the owners or owners thereof, unless so ordered by the county court of the county in which the proposed highway is situated; such order shall be made on the certificate of the commissioners of highways of the town or towns in which the proposed highway is situated, showing that the public interest will be greatly promoted by the laying out and opening of such highway, and that commissioners appointed by the court have certified that it is necessary; a copy of the certificate, with eight days' notice of the time and place of the hearing before the county court, shall be served on the owners of the land, or if they are not residents of the county, upon the occupants; the county court upon such certificates, and the proofs and other proceedings therein, may order the highway to be laid out and opened, if it deems it necessary and proper. The commissioners of highways shall then present the order of the county court, with the certificate and proofs upon which it was granted, certified by such court to the general term of the supreme court in the judicial department in which the land is situated, upon the usual notice of motion, served upon the owner or occupant, or the attorney who appeared for them in the county court. If such general term of the supreme court shall confirm the order of the county court, the commissioners of highways shall then lay out and open such highway as in other cases. The provisions of this section shall not apply to vineyards planted, or to buildings, fixtures, erections, yards or inclosures, made or placed on such land after an application for the laying out and

opening the highway shall have been made. In case the highway to be laid out shall constitute an extension or continuation of a public highway already in use, and shall not, as to such new portion, exceed half a mile in length, the commissioners may lay out such extension or continuation, of a width of less than three rods, provided, however, that it be not less than the widest part of the highway of which it is an extension or continuation. In such case the commissioners shall specify in their certificate the precise width of the new portion of such highway, and shall certify that such width is as great at least as the widest part of the highway of which it is a continuation or extension. (Amended by L. 1895, chap. 508.)

Amendment of section.—The amendment of 1895 added the last two sentences relating to the width of highways constituting extensions of highways already in use.

Limitations Enumerated.—No highway can be laid out through any of the following tracts or parcels of land without the consent of the owner or owners or without an order of the county court of the county in which the proposed highway is located:

1. An orchard of the growth of four years or more (§ 90.) It does not follow that a whole field is an orchard because there are fruit trees in some part of it. *People v. Judges of Dutchess*, 23 Wend. 361. See also *Snyder v. Plass*, 28 N. Y. 465; *Snyder v. Trumphour*, 38 N. Y. 355; *People ex rel. Banner v. Temple*, 27 Hun. 128; *Matter of Four-corner Road*, 37 St. Rep. 711.

2. A garden cultivated as such for four years or more (§ 90). This does not apply to all land inclosed within a garden, but only to land which is part of a cultivated garden and actually used as such. *People ex rel. Cook v. Comrs. of Highways*, 57 N. Y. 549; *People ex rel. Stanton v. Horton*, 8 Hun. 357. Whether land is a garden is a question of fact. *People ex rel. Clineh v. Moore*, 15 N. Y. Supp. 504; *aff'd. 129 N. Y. 639.*

3. A grape vineyard of one or more years' growth, and used in good faith for vineyard purposes before the application for laying out the highway is made. (§ 90.)

4. Buildings, or any fixtures or erections for the purposes of trade or manufacture, or any yard or inclosure necessary to the use and enjoyment thereof made and placed on such land

re the application for laying out the highway is made. (.) The statute expressly deprives the commissioners of jurisdiction to lay out a highway through a yard, and provides for proceeding before the county judge to be confirmed by the appellate division. *Bearslee v. Dolge*, 143 N. Y. 160, *Matter of Oakley Ave.* 85 Hun. 446. A yard cannot be laid so as to take in a portion of a highway after it has been laid out by a commissioner. *People ex rel. Miller v. Es*, 1 Hun. 530. Nor can buildings be erected so as to limit the opening of a highway after it has been laid out. *People ex rel. Hubbard v. Harris*, 63 N. Y. 391. Ground adjoining a saw mill and used for piling logs, but whose limits are fixed by fences or other visible marks or by definite occupation is not within the statute. *People ex rel. Williams v. Man*, 24 N. Y. 559. A highway can not be laid out over lands acquired by a railroad corporation for the site of an engine-house and yards necessary for its use at a station. (*Alb. N. R. R. Co. v. Brownell*, 24 N. Y. 345.) Nor across a stream taken as the terminus of a railroad to the sea beach for purposes. (*Pros. P'k & C. I. R. R. Co. v. Williamson*, 1 N. Y. 552.)

Burying grounds, except as provided in § 91 post.

Lands held by soldiers' monument associations, except by special permission of the legislature. (L. 1866, chap. 273, § 6.) Lands dedicated to cemetery purposes, except by special permission of the legislature. (L. 1847, chap. 133.)

Consent of owner.—The commissioners have no jurisdiction to lay a road through any of such lands without either the consent of the owner or without the order of the county court of the county in which the proposed highway is located. The consent of the owners may be in the following form:

FORM NO. 75.

Consent to Lay Out Highway Through Orchard.

Whereas, L. M. has made application in writing to the commissioners of highways of the town of in the county of the day of 19.... to lay out a highway in my own beginning at (insert description), and which said highway shall pass through my orchard.

I, therefore, do hereby consent that such highway be so laid out. I, worked and used through my said orchard; but this consent not be construed as a waiver or release of my claim for damages, if any, thereon.

And the day of 19....

T. W.

If the highway commissioners undertake to lay out a highway through any of such lands without such consent or order, they and their agents are trespassers. The certificate of twelve free-holders that such highway is necessary is no longer required.

Where the owner of the land through which the highway is proposed to be located consents to the laying out of such highway, the highway commissioners may lay out such highway without an order of the court.

Their order may be in the following form:

FORM NO. 76.

**Order of Highway Commissioners Laying Out Highway Through
Orchard, on Consent of Owner.**

Whereas, L. M. did, on the day..... of 19.... present to us as commissioners of highways of the town of in the county of a written application to lay out a highway in said town, passing through an orchard of T. W., of the growth of four years or more, and the said T. W., having consented that such highway be so laid out.

Now, therefore, we, the undersigned commissioners of highways, pursuant to section 90 of the highway law, do hereby lay out said highway, as so applied for, whereof a survey has been made as follows: Beginning (insert survey bill) and the line of survey is to be the center of the highway which is to be rods in width.

Dated this day of 19....

A. B.
C. D.
E. F.

Commissioners of Highways.

The commissioners must cause a survey to be made which shall be incorporated in their certificate and which shall be made at the expense of the town. (§ 81.) The highway so laid out shall not be less than three rods in width, except as provided in the latter part of § 90 in the case of an extension of an existing highway. The certificate, including a copy of the survey shall be filed in the town clerk's office.

The commissioners may lay out a road through any kind of property with the consent of the owner. The oral consent of the owner to the laying out of a highway through his orchard, vineyard, garden, fixtures, etc., is sufficient provided the commissioners act upon it immediately and the road is laid out before such consent is revoked. *People ex rel. Bodine v. Goodwin*, 5 N. Y. 568. Such oral consent may be revoked.

A sale and conveyance of the land in good faith before the road is laid out would operate as a revocation. If the commissioners have acted on the faith of the verbal consent, by laying

out the road, the owner will be estopped from denying the legality of the act. *Marble v. Whitney*, 28 N. Y. 297.

Proceedings where owner refuses consent.—If the consent of the owner or owners can not be obtained the party in favor of laying out such highway shall within thirty days after applying to the highway commissioners make a further application to the county court for the appointment of three commissioners to determine upon the necessity of such highway proposed to be laid out and to assess the damages caused by reason of the laying out of the same. Such application shall be verified and shall be in the form prescribed in Form No. 60. The order appointing such commissioners shall be the same as that prescribed in Form No. 62, and the qualifications, powers and duties of such commissioners by the order granted as prescribed in § 84. After such commissioners have rendered a decision in favor of the application and assessing the damages caused thereby, the county court shall not make an order to lay out such highway unless the highway commissioners shall certify to the county court that the public interest will be greatly promoted by the laying out and opening of such highway and that the commissioners appointed by the court have certified that it is necessary. The certificate of the highway commissioners may be in the following form:

FORM NO. 77.

**Certificate of Highway Commissioners Laying Out Highway
Through Orchard After Contest.**

COUNTY COURT—.....COUNTY.

In the Matter of the Application of L. M., to Lay Out a Highway in the
Town of and the Assessment of Damages Therefor.
To the County Court of County:

The undersigned, commissioners of highways of the town of, in said county, hereby certify that on the day of 18...., L. M., who is liable to be assessed for highway labor in said town, made a written application to us as such commissioners to lay out a highway in said town, passing through an orchard of T. W., of the growth of four years or more, pursuant to section 90 of the highway law, as follows: (insert a copy of the application). And that the said T. W. does not consent thereto; that the following proceedings were had upon such application. (Insert a history of the proceedings up to and including the decision of the commissioners appointed by the courts). We further certify that the public interest will be greatly promoted by the laying out and opening of such highway through said orchard; and commissioners appointed by this court have certified that such highway is necessary and proper, and have assessed the damages of T. W. by reason thereof, at \$.....

Dated this day of 18....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

A copy of the certificate, with eight days' notice of the time and place of the hearing before the county court, shall be served on the owners of the land, or, if they are not residents of the county, upon the occupants. The notice of the time and place may be in the form prescribed on page

Order of county court; where owner refuses consent.—The county court upon such certificates, and the proofs and other proceedings therein, may order the highway to be laid out and opened, if it deems it necessary and proper. Such order may be in the following form:

FORM NO. 78.

Order of Court Laying Out Highway Through Orchard, After

Contest.

At a term of the county court, held at, in
the of, on the day of,
19....

Present—Hon. E. E., county judge.

In the Matter of the Application of L. M. to Lay Out a Highway in the
Town of, and the Assessment of Damages Therefor.

Upon reading and filing the certificate of A. B., C. D. and E. F., commissioners of highways of the town of, in the county of, dated the day of, 19..., stating (here state the substance of the facts in the certificate) with proof of due service of notice of this motion, and upon reading the (state what papers), and after hearing A. D., of counsel for the applicant, and B. B., of counsel for T. W., opposed, it is hereby ordered that said highway be laid out and opened pursuant to section 90 of the highway law, with ten dollars cost of this motion.

E. E.,
County Judge.

Proceedings in appellate division.—The commissioners of highways shall then present the order of the county court, with the certificate and proof upon which it was granted, certified by such court to the Appellate Division of the Supreme Court, in the judicial department in which the land is situated. At least eight days before such hearing, a notice of motion shall be served upon the owner or occupant or the attorney who appeared for them in the county court. The notice of motion may be in substantially the same form as that prescribed in Form No. 70.

If the Appellate Division of the Supreme Court shall confirm the order of the county court, the order may be made in the following form:

FORM NO. 79.

Order of Appellate Division for Laying Out Highway Through Orchard.

In the Appellate Division of the Supreme Court, in the department, held at the court-house in the city of on the day of 19....

Present—Hon. A. R., P. J.; Hon. B. D., Hon. C. E., Hon. E. F. and Hon. J. K., Justices of the Supreme Court.

In the Matter of the Application of L. M., to Lay Out a Highway in the Town of and the Assessment of Damages Therefor.

A. B., C. D., and E. F., as commissioners of highways of the town of in the county of having presented to us the order of the county court of county, dated the day of 19..., that a highway be laid out in said town, passing through the orchard of T. W., of the growth of four years or more, pursuant to section 90 of the highway law, the said T. W. not consenting thereto, with the certificate and proofs upon which the said order was granted, duly certified by such court, with proof of due service of notice of this motion, on the said T. W., and after hearing B. B., of counsel for the applicant, on the motion, and X. B., of counsel for T. W., opposed, it is hereby ordered that the said order of such county court be, and the same is hereby confirmed, with \$..... costs of this motion.

Certificate of highway commissioners.—After the order of the county court in favor of the application has been confirmed by the Appellate Division of the Supreme Court, the commissioners of highways shall make the following certificate:

FORM NO. 80.

Certificate of Commissioners of Highways Laying Out Highway Through Orchard, After Contest.

Whereas, L. M. did, on the day of 19...., present to us as commissioners of highways of the town of in the county of a written application to lay out a highway in said town, passing through an orchard of T. W., of the growth of four years or more, and such proceedings having been had thereon, pursuant to section 90 of the highway law, that the county court of said county has ordered said highway to be laid out and opened, which said order has been duly confirmed by the appellate division of the Supreme Court in the department, which said application, certificates and orders and other papers in said proceedings are duly filed in the office of the town clerk of said town, to which reference is here made.

Now, therefore, we, the undersigned commissioners of highways, pursuant to section 90 of the highway law, do hereby lay out said highway as so applied for and ordered, whereof a survey has been made as follows: Beginning (Insert survey bill) and the line of survey is to be the center of the highway, which is to be rods in width.

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 91. Laying out highways through burying-grounds.—No private road or highway shall be laid out or constructed upon or through any burying-ground, unless the remains therein contained are first carefully removed, and properly reinterred in some other burying-ground, at the expense of the persons desiring such road or highway, and pursuant to an order of the county court of the county in which the same is situated, obtained upon notice to such persons as the court may direct.

Previous use for burial purposes.—The fact that grounds have been previously used for burial purposes does not preclude their acquisition for highway purposes. *Matter of Street Opening*, 133 N. Y. 329. See notes to § 90.

§ 92. Costs, by whom paid.—In all cases of assessments of damages by commissioners appointed by the county judge or special county judge, the costs thereof shall be paid by the town thereof except when reassessment of damages shall be had on the application of the party for whom the damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment; and when application shall be made by two or more persons for the reassessment of damages, all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered by action in favor of any person entitled to the same. Each commissioner appointed by the court, for each day necessarily employed as such, shall be entitled to four dollars and his necessary expenses. (Amended by L. 1897, chap. 344, and L. 1904, chap. 353, in effect April 16, 1904).

Amendments to section.—The amendment of 1897 reduced the compensation of commissioners from six to four dollars per day. The amendment of 1904 merely conforms the section to the amendment to § 83 allowing the county judge or special county judge to entertain the proceeding.

Construction of section.—Costs do not include a personal debt incurred by a highway commissioner, nor to a bill for legal services rendered by an attorney employed by him. *People ex rel. Bevins v. Supervisors*, 82 Hun. 298; 31 N. Y. Supp. 248. The section refers only to a valid assessment of damages. *Matter of Miller*, 9 App. Div. 260.

§ 93. Damages assessed, and costs to be audited.—All damages to be agreed upon, or which may be finally assessed, and costs against the town, as herein provided, shall be laid before the board of town auditors, or in towns not having a board of town auditors, before the town board, to be audited with the charges of the commissioners, justices, surveyors or other persons or officers employed in making the assessment, and for whose services the town shall be liable, and the amount shall be placed upon the town abstract and levied and collected in the town in which the highway is situated, and the money so collected shall be paid to the commissioners of highways of such town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges aforesaid. (Amended by L. 1898, chap. 106).

Construction of section.—The words “charges of the commissioners,” etc., do not apply to the fees of an attorney employed by petitioner. *Epping v. City of New York*, 57 App. Div. 114; 68 N. Y. Supp. 41.

*** § 94. When officers of different towns disagree about highway.**—When the commissioners of highways of any town or officers of any village or city having the powers of commissioners of highways, shall differ with the commissioners of highways of any other town, or with the officers of such a village or city having the powers of commissioners of highways in the same county, relating to the laying out of a new highway or altering an old highway, extending into both towns, or a town and a village or city, or upon the boundary line between such towns or such town, and a village or city, or when commission-

ers of highways of a town in one county, shall differ with the commissioners of highways of a town, or the officers of a village or city having the powers of commissioners of highways, in another county, relating to the laying out of a new highway, or the alteration of an old highway, which shall extend into both counties, or be upon the boundary line between such counties the commissioners of highways of both towns or the officers of the village or city having such powers, shall meet on five days written notice, specifying the time and place, within some one of such towns, villages or cities, given by either of such commissioners, or officers having powers of commissioners of highways, to make their determination in writing, upon the subject of their differences. If they cannot agree, they or either of them may certify the fact of their disagreement to the county court of that county, if the proposed highway is all in one county, or if in different counties, or if the county judge is disqualified or unable to act, to the supreme court; such court shall thereupon appoint three commissioners, freeholders of the county, not residents of the same town, village or city, where the highway is located; or if between two counties, then freeholders of another county, who shall take the constitutional oath of office, and upon due notice to all persons interested, view the proposed highway, or proposed alteration of a highway, administer all necessary oaths, and take such evidence as they shall deem proper, and shall decide all questions that shall arise on the hearing, as to the laying out or altering of such highway, its location, width, grade and character of road bed, or any point that may arise relating thereto; and if they decide to open or alter such highway, they shall ascertain and appraise the damages, if any, to the individual owners and occupants of the land through which such new or altered highway is proposed to pass, and shall report such evidence and decision to such court, with their assessment of damages, if any, with all convenient speed.

On the coming in of such report, the court may, by order, confirm, modify, or set aside the report in whole or in part and may order a new appraisal by the same or other commissioners, and shall decide all questions that may arise before it. And all orders and decisions in the matter shall be filed in the county clerk's office of each county where the highway is located, and shall be duly recorded therein. This section shall not be so construed as to compel any town or towns to construct, repair or maintain a bridge upon a boundary line between towns where, previous to the passage of such amendatory act, an application had been made to any court, to compel the construction, repair and maintenance of a bridge upon such a boundary line, and such application had been denied. (Amended by L. 1901, chap. 162; and L. 1903, chap. 460).

Construction of section.—It is the intention of the statute to require a meeting of the highway commissioners of the towns in the different counties, and a certificate of their disagreement, as a condition precedent to the exercise of jurisdiction on the part of the supreme court in the appointment of commissioners. Matter of Barrett, 7 App. Div. 482; 40 N. Y. Supp. 266.

Notice of meeting of commissioners.—The notice may be in the following form:

FORM NO. 81.

Notice of Meeting of Commissioners of Two or More Towns to Consider Laying Out of Highway.

To N. M. and W. W.:

Notice is hereby given that the undersigned who are commissioners of highways for the town of will meet at in said town, on the day of 19.... at o'clock in the noon, for the purpose of determining upon the necessity of, and arriving at a common understanding in relation to, the laying out of a new highway (or the altering of a highway) extending from the town (or city or village) of to the town (or city or village) of and described as follows: (Insert description.)

Dated this day of 19....

Certificate of disagreement.—If they can not agree, the either of them may certify the fact of their disagr' + county court of the county, if the proposed hig'

county, or if in different counties, or if the county judge is disqualified or unable to act, to the supreme court.

The certificate may be in the following form:

FORM NO. 82.

Certificate of Highway Commissioners of Disagreement.

COUNTY COURT—.....COUNTY.

In the Matter of the Application of L. M. to Lay Out (or Alter) a Highway Extending From the Town (or City or Village) of to the Town (or City or Village) of
To the County Court of County:

The undersigned, commissioners of highways of the town of in the county of hereby certify that on the day of 19...., L. M., who is liable to be assessed for highway labor in the town of made a written application to us as such commissioners to lay out (or alter) a highway extending from the town (or city or village) of in the county of to the town (or city or village) of in the county of That the highway commissioners of the said towns (or the said town and the city or village authorities of the said city or village) cannot agree as to the necessity of such highway or the terms upon which the same shall be laid out.

S. S.,
G. G.,
J. J.,
Commissioners.

Order appointing commissioners.—Such court shall thereupon appoint three commissioners freeholders of the county, not residents of the same town, village or city where the highway is located; or if between two counties, then freeholders of another county.

The order appointing such commissioners and the notice of appointment may be in the following form:

FORM NO. 83.

Order of Court Appointing Commissioners to Determine Necessity of Laying Out Highway Between Two Towns.

At a term of the county court of the county of held at in the in and for said county.

Present—Hon. E. E., county judge,

In the Matter of the Application of L. M. to Lay Out (or Alter) a Highway Extending From the Town (or City or Village) of to the Town (or City or Village) of

On reading and filing the certificate of S. S., G. G. and J. J., highway commissioners of the town of and D. D. and F. F. (title of officials, of the city or village) of in the county of dated the day of 19...., stating (here state substance of facts in the certificate) and upon reading the (state what papers) and after hearing M. D. of counsel for the applicant, and O. L. P., of counsel for R. C. C., opposed, it is hereby ordered that A. B., A. C. and D. D., of the town of county of be, and they are hereby appointed commissioners to determine upon the necessity of laying out (or altering) such highway (or adjust the terms upon which such highway shall be laid out (or altered).

Notice of Appointment.

To S. S., G. G. & J. J.:

Take notice that you and each of you have been duly appointed commissioners by an order of the county court, a copy of which is hereto annexed, and you are hereby required to fix a time and place at which you will all meet to hear the commissioners of highways of both towns or the highway commissioners of the town of and the (name corresponding officials) of the city (or village) of and all other persons interested in the highway question.

Dated this day of 19....

Proceedings of commissioners.—The commissioners so appointed shall take the constitutional oath of office (for oath see page 162), and upon due notice to all persons interested, view the proposed highway or proposed alteration of highway, administer all necessary oaths, and take such evidence as they shall deem proper, and shall decide (subject to the approval of the court, as hereinafter provided) all questions that shall arise on the hearing, as to the laying out or altering of such highway, its location, width, grade and character of roadbed, or any point that may arise relating thereto; and if they decide to open or alter such highway, they shall ascertain and appraise the damages, if any, to the individual owners and occupants of the land through which such new or altered highway is proposed to pass, and shall report such evidence and decision to such court, with their assessment of damages if any, with all convenient speed.

The decision of such commissioners in favor of the application shall be in the following form:

FORM NO. 84.**Decision of Commissioners as to Laying Out Highway Between Two Towns.**

The undersigned, by an order of the county court of county, dated the day of 19.... having been appointed commissioners to certify as to the necessity of laying out (or altering) a highway extending between the town (city or village) of and the town (city or village) of in the county of and described as follows (insert description); now, therefore, we, the said commissioners, having given due notice of the time and place at which we would meet, and all having met at in the town of on the day of 19.... pursuant to such notice, and having taken the constitutional oath of office, and on proof of the service of the notice on the highway commissioners of the towns of (or of the town of and city or village of) and having viewed the proposed highway (or proposed alteration of a highway) and the lands through which it is proposed to be laid out (or altered), and having heard all the allegations of the commissioners of highways and the parties interested therein, and the evidence of all the witnesses produced, do thereupon certify that in

our opinion it is necessary and proper that the highway be laid out (or altered) and we have assessed the damages required to be assessed by reason of laying out (or altering) such highway as follows:

The damages of M. N., at \$.....; the damages of M. O., at \$.....; etc.

Dated this day of, 19....

S. S.
G. G.
J. J.
Commissioners.

Order confirming, modifying or vacating report of commissioners.—On the coming in of such report, the court may, by order, confirm, modify or set aside the report in whole or in part, and may order a new appraisal by the same or other commissioners, and shall decide all questions that may arise before it.

Reference may be had to the forms on pages 171-173 for the forms to be used in this proceeding.

Papers to be filed.—All orders and decisions in the matter shall be filed in the county clerk's office of each county where the highway is located, and shall be duly recorded therein.

§ 95. Difference about improvements.—When the commissioners of highways of a town, or the officers of a village or city having the powers of commissioners of highways therein, shall desire to make a new or altered highway extending beyond the bounds of such town, village or city, a better highway than is usually made for a common highway, with a special grade or road-bed, drainage or improved plan, and are willing to bear the whole or a part of the expense thereof beyond such bounds, but can not agree in regard to the same, upon written application of either of the commissioners or officers, and notice to all parties interested, such court shall make an equitable adjustment of the matters, and may direct, that in consideration of the payment of such portion of the additional expense by the town, village or city that desires the improved and better highway, as shall be equitable, its officers, contractors, servants and agents may go into such town, village or city, and make the grade and road-bed, and do whatever may be necessary and proper for the completion of such better highway, advancing

the money to do it; the amount of damages to each owner or occupant, shall be ascertained and determined by commissioners, who shall be appointed, and whose proceedings shall be conducted in the manner provided by the last preceding section; and upon the coming in of their report of damages, and of the expenses paid, such court shall, on notice to all parties interested, direct that the amount of damages assessed to each owner or occupant, if any, and all such expenses be paid by each, any or all of such towns, villages or cities as shall be just and equitable, and the damages and expenses assessed and allowed, as in this and the last preceding sections, shall be paid and collected as if fixed by the commissioners of highways of the towns, or the officers of such villages or cities having the powers of such commissioners. Every commissioner appointed as herein provided, shall be paid six dollars for each day actually and necessarily employed in such service, and necessary expenses.

§ 96. Highway in two or more towns.—When application is made to lay out, alter or discontinue a highway located in two or more towns, all notices or proceedings required to be served upon the commissioners of highways, shall be served upon the commissioners of highways of each town; and the commissioners appointed by the court, shall determine the amount of damages to be paid by each town, and when the towns are in different counties, the application for the appointment of commissioners shall be made to a special term of the supreme court held in the district where the highway or some part of it is located; and the same proceedings shall thereafter be had in the supreme court of such district as are authorized by this chapter to be had in the county court.

Construction of section.—This section does not conflict with § 94, ante. Its provisions are for the purpose of carrying out in detail the requirements of that section. *Matter of Barrett*, 7 App. Div. 482; 40 N. Y. Supp. 266.

Who may institute proceedings.—The proceedings may be initiated by a person liable for highway labor in one town to lay out a highway partly in his town and partly in another town, and when he has complied with all the statutory requirements, and the towns are in the same county, the county court is authorized to appoint commissioners in the matter. *People ex rel. Knapp v. Kelk*, 90 Hun, 497; 36 N. Y. Supp 51.

§ 97. Laying out, dividing and maintaining highway upon town line.—An application to lay out a highway upon the line between two or more towns shall be made to the commissioners of highways of each town, who shall act together in the matter; and, upon laying out any such highway, they shall divide into two or more highway districts, in such manner that the labor and expense of opening, working and keeping the same in repair through each of such districts may be equal, as near as may be, and to allot an equal number of the districts to each of the towns; each district shall be considered as wholly belonging to the town to which it shall be allotted, for the purpose of opening and improving the highway and for keeping it in repair; and the commissioners of highways shall cause the highway and the partition and allotment thereof to be recorded in the office of the town clerk in each of the respective towns. If such highway be upon a line between one or more towns and a city or incorporated village, such application shall also be made to the officers of such city or village having the powers of commissioners of highways, and such officers may agree with the highway commissioners of such towns as to the division of the labor and expense of opening, working and maintaining such highway. Whenever such officers shall disagree as to such division, application may be made for the appointment of commissioners, and the same procedure shall be had as is prescribed in this article for the settlement of disagreements between the highway officers of different towns. All highways heretofore laid out upon the line between any two towns or between a

town and a city or an incorporated village shall be divided and allotted or redivided and re-allotted, recorded and kept in repair, in the manner above directed. (Amended by L. 1894, chap. 727, and by L. 1895, chap. 181.)

Amendments of section.—The amendments to the section add the latter part relating to highways upon a line between a town and a city or village.

The districts allotted as provided in § 97 are the ordinary highway districts of the town. *Day v. Day*, 94 N. Y. 153.

Application and allotment.—The following forms may be used for the application and allotment:

FORM NO. 55.

Application for Laying Out Highway on Town Line.

To the Commissioners of each of the Towns A. and B. in the County of

We, the undersigned, L. M., an inhabitant of the town of A. in said county, liable to be assessed for highway labor therein, and T. W., an inhabitant of the town of B., said county, and liable to be assessed for highway labor therein, hereby apply to you to lay out a highway on the line between said towns, beginning (here insert description of the proposed highway) and which said highway will pass through the lands of J. K. and R. S.

Dated this day of 19....

L. M.
T. W.

The proceedings are the same as where the highway is proposed to be laid out wholly within one town, except consents, releases, dedications, etc., shall be given to both of the towns, and the commissioners of highways of both towns should unite in making any order or certificate which they are required to make; and all papers used in the proceeding should be made in duplicate, and one set filed in the office of the town clerk of each town. If the proposed highway is on a county line, and application is made to the court, it should be to the Supreme Court at special term.

The following should be added to the order or certificate laying out the highway, a form for which may be found on p. 174:

FORM NO. 56.

Order Laying Out Highway on Town Line.

And it is ordered that the said highway be divided into (two) districts as follows: That the part thereof from to shall be one of said highway districts, and shall be allotted to the town

of A., and the residue of said highway shall be the other of said highway districts, and shall be allotted to the town of B.

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways of the Town of A.

G. H.,

I. J.,

K. L.

Commissioners of Highways of the Town of B.

§ 98. Final determination, how carried out.—The final determination of commissioners appointed by any court, relating to the laying out, altering or discontinuing a highway, and all orders and other papers filed or entered in the proceedings, or certified copies thereof from the court where such determination, order and papers are filed and entered, shall be forthwith filed and recorded in the town clerk's office of the town where the highway is located; and every such decision shall be carried out by the commissioners of highways of the town, the same as if they had made an order to that effect.

The final determination of the commissioners appointed by any court as to laying out, altering or discontinuing a highway must be carried out by the commissioner of highways. People ex rel. D. L. & W. R. R. Co. v. County Court, 92 Hun, 13; 37 N. Y. Supp. 869.

§ 99. Highways abandoned.—Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; but the period during which any action or proceeding shall have been, or shall be pending in regard to any such highway, shall form no part of such six years; and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right of way. The commissioners of highways shall file, and cause to be recorded in the town clerk's office of the town, written description, signed

by them, of each highway and public right of way so abandoned, and the same shall thereupon be discontinued. (Amended by L. 1899, chap. 622.)

Amendment of section.—The amendment of 1899 provides that non-user of a public right of way for a period of six years shall constitute an abandonment. This provision would apply where the public has acquired a prescriptive right by user, amounting to implied dedication, but the highway has not been formerly laid out by the authorities.

Modes of abandonment.—A highway may be abandoned in either of the following ways:

1. By failure to open and work within six years from the time it is laid out or dedicated to public use.
2. By disuse and not having been traveled upon for six years.
3. By the statutory proceeding to discontinue a highway.

Failure to open and work.—The period during which any action or proceeding is pending in regard to any highway, forms no part of the six years during which a highway must be opened and worked to prevent its abandonment.

The requirement to open and work a highway implies that it must be made passable as a highway for public travel. It need not be a first-class road, it need not be finished, but it must be sufficient to enable the public to pass over it. (Beckwith v. Whalen, 70 N. Y. 430.)

Disuse.—Every highway not traveled or used as a highway for six years ceases to be a highway. This applies as well to highways created by prescription or user for twenty years as to highways laid out by the highway commissioners or created by dedication. (Amsbry v. Hinds, 48 N. Y. 57; People ex rel. Yonkers v. N. Y. C. & H. R. R. Co., 69 Hun, 166.)

The highway commissioners are required to file and cause to be recorded in the town clerk's office of the town, a written description, signed by them, of each highway so abandoned, and such highway shall thereupon be discontinued. (H. L., § 99.)

The certificate describing the highway abandoned may be in the following form:

FORM NO. 67.

Certificate of Abandonment of Highway.

We, the undersigned, commissioners of highways of the town of , in the county of , hereby certify that the highway (here describe it), has been abandoned by the public, and is

no longer used as a public highway; and pursuant to section 99 of the highway law, the same is discontinued.

Dated this day of 19.....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

If a highway is rendered impassable or fenced off by a trespasser and the traveling public acquiesce for a period of six years, so that in all that time no one can or does make use of the highway, it ceases to be a highway. *Horey v. Village of Haverstraw*, 124 N. Y. 273; *Mangain v. Sing Sing*, 26 App. Div. 464; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146. It does not follow that because a portion of that which was originally laid out as a continuous highway remains such that all of it does. If a part of it cease to be traveled and used for a period of six years, the public in the meantime using some other route, such part is no longer a highway. A highway opened and worked for a part of the distance only, as described in the survey, but not on a particular portion thereof until after the lapse of more than six years, ceases, as to such part, to be a highway for any purpose. (*Horey v. Village of Haverstraw*, 124 N. Y. 273.)

The burden of showing non-user is on the party making the claim. *Id.* *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397; *Matter of Woolsey*, 95 N. Y. 135.

Statutory proceeding.—The statutory proceeding to discontinue a highway is the same as that to lay out or alter a highway. Application should first be made to the highway commissioners of the town and then within thirty days thereafter a further application should be made to the county court to appoint three commissioners to determine upon the uselessness of such highway and to assess damages for its discontinuance. A motion to confirm, vacate or modify the decision of such commissioners may be made in the same manner as in the other proceeding.

Reference may be had to the forms Nos. 60-74 which, with slight changes, will serve for forms used in this proceeding.

A town meeting has no power to discontinue a highway once established. That can be done only by the intervention of the authorities and according to the procedure pointed out in the highway law. (*Hughes v. Bingham*, 135 N. Y. 347.)

§ 100. Highways by use.—All lands which shall have been used by the public as a highway for the period of twenty years

or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the commissioners of highways shall order the overseers of highways to open all such highways to the width of at least two rods.

Construction of section.—See notes under § 80. There can be no implied and irrevocable dedication by user until land has been used by the public as a highway for the period of twenty years. Premises which are so used become public highways without formal dedication. *Corning v. Head*, 86 Hun, 12; 33 N. Y. Supp. 360; *City of Cohoes v. R. R. Co.*, 134 N. Y. 397; *James v. Sammis*, 132 N. Y. 239; *Spier v. New Utrecht*, 121 N. Y. 420. Proof of acceptance is unimportant. The user itself constitutes an acceptance. *Porter v. Village of Attica*, 33 Hun, 605; *Vandermark v. Porter*, 40 Hun, 397.

Character of use.—The use must be like that of ordinary highways, in order to justify the commissioner in laying out a highway under this section. Private roads, for instance, do not become public highways because the public are permitted to travel upon them. *Spier v. Town of New Utrecht*, 121 N. Y. 420; *Palmer v. Palmer*, 150 N. Y. 139. The public may acquire a prescriptive right of way, but unless there has been a use of the land as a highway it does not become one. As said by the court in the Spier Case, *supra*, "The user must be like that of highways generally. The road must not only be travelled upon, but it must be kept in repair or taken in charge and adopted by the public authorities." This doctrine was followed in *People v. Underhill*, 144 N. Y. 316, and in *Palmer v. Palmer*, *supra*.

Opening highway.—The highway commissioner can only determine questions as to the boundary of the road according to its actual use for twenty years. *Kerr v. Hammer*, 39 St. Rep. 708; *Ivory v. Town of Deer Park*, 116 N. Y. 476; *Alpaugh v. Bennett*, 59 Hun, 45. And his order cannot increase the width or change the location of the highway. If the actual user has not been at least two rods in width, it seems that the highway cannot be laid out to that width without a formal proceeding under the statute. Certainly the commissioner cannot order the overseers to arbitrarily take land for that purpose. Such a proceeding would be unconstitutional and void.

§ 101. Fences to be removed.—Whenever a highway shall have been laid out through any inclosed, cultivated or improved

lands, in conformity to the provision of this chapter the commissioners of highways shall give to the owner or occupant of the land through which such highway shall have been laid, sixty days' notice in writing to remove his fences; if such owner shall not remove his fences within the sixty days, the commissioners shall cause them to be removed, and shall direct the highway to be opened and worked.

Form of notice.—The notice may be in the following form:

FORM NO. 88.

Notice to Owner or Occupant to Remove Fences Along Highways.

To T. W.:

Please take notice that we, the undersigned commissioners of highways of the town of , in the county of , having by an order (or certificate), duly made and filed in the office of the town clerk of said town, bearing date the day of 19...., laid out a public highway through your inclosed lands, do hereby require you to remove your fences from within the bounds of said highway, within sixty days after the service of this notice.

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 102. Penalty for falling trees.—If any person shall cut down any tree on land not occupied by him, so that it shall fall into any highway, river or stream, unless by the order and consent of the occupant, the person so offending shall forfeit to such occupant, the sum of one dollar for every tree so fallen, and the like sum for every day the same shall remain in the highway, river or stream.

Shade trees in highway. See § 156, post, and notes. Abatement of tax for planting. See § 44, ante and notes.

§ 103. Fallen trees to be removed.—If any tree shall fall, or be fallen by any person from any inclosed land into any highway, any person may give notice to the occupant of the land from which the tree shall have fallen, to remove the same

within two days; if such tree shall not be removed within that time, but shall continue in the highway, the occupant of the land shall forfeit the sum of fifty cents for every day thereafter, until the tree shall be removed.

The notice may be in the following form:

FORM NO. 89.

Notice to Remove Fallen Tree.

To T. W.:

Please take notice that a tree has fallen from your inclosed land into the highway (state where) and you are hereby required to remove the same within two days after the service of this notice.

Dated this day of 19....

L. M.

§ 104. Penalty for obstruction or encroachment.—Whoever shall obstruct or encroach upon any highway, or shall unlawfully fill up or place any obstruction in any ditch for draining the water from any highway, shall forfeit for every such offense the sum of five dollars.

Necessity of notice.—It is not necessary under this section to give the defendant notice of the obstruction specifying the extent and location thereof and directing him to remove the same within sixty days, before an action can be brought to recover the penalty. *Town of Corning v. Head*, 86 Hun. 12; *33 N. Y. 360*.

Title of real estate.—An action for a penalty because of an obstruction of a highway does not involve a title to real estate. *Paine v. East*, 15 Wk. Dig. 281; *Parker v. Van Houten*, 7 Wend. 145; *Sage v. Barnes*, 9 John, 365. But it is a good answer to a suit brought in a justice's court to plead title to the land and deny that the place is a highway. *Little v. Young*, 34 N. Y. 452.

Highway commissioners of two towns cannot unite as plaintiff and bring an action for a penalty or forfeiture for an encroachment upon a highway. The authority is confined to the officers of the town where the offense has been committed. *Bradley v. Blow*, 17 Barb. 480.

Highway need not be recorded.—It is not necessary that the highway obstructed be recorded before the penalty can be recovered. *Davenpeck v. Lampert*, 44 Barb. 596. The liability

exists for obstructing a highway dedicated to public use, and used as such for twenty years. *Town of Corning v. Head*, 86 Hun, 12; *Town of West Union v. Richey*, 64 App. Div. 156; 71 N. Y. Supp. 871. Nor can the owner of land obstruct the highway, even if damages assessed for taking the land have not been paid. *Chapman v. Gates*, 54 N. Y. 132. But see *Little v. Dunn*, 34 N. Y. 452, to the effect, that a highway cannot be obstructed until it has been opened.

General doctrine relating to obstructions.—The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above or below the surface, is guilty of maintaining a nuisance, for which he is liable in damages to a person directly injured and to indictment on behalf of the people. *People v. Horton*, 64 N. Y. 610. Thus it is a nuisance to place logs in a highway where they are not needed in repairing or improving it, even though they are placed at the side of the traveled path. (*Johnson v. Whitfield*, 18 Me., 286.) It is a nuisance to erect a gate or a fence across a highway or to construct a building thereon, or to cut a ditch or mill-race across it without bridging the same, and in general, to unnecessarily or permanently occupy the highway in any manner other than for highway purposes. (*Kelly v. Commonwealth*, 11 Serg. & Rawl., 345; *Stetson v. Faxon*, 19 Pick., 147; *Dygert v. Schenck*, 23 Wend., 445.) Long continued obstruction will not justify its maintenance. (*Driggs v. Phillips*, 103 N. Y. 77; *Walker v. Caywood*, 31 N. Y. 51; *Milkan v. Sharpe*, 27 N. Y. 611, 622; *Windsor v. D. & H. C. Co.* 92 Hun. 127; *Mangam v. Village of Sing Sing*, 26 App. Div. 464. The legislature, by virtue of its general control over public streets and highways, has the power to authorize structures in the streets for the convenience of business that under the principles of common law would be obstructions or encroachments, and may delegate the power to the governing body of a municipality, (*Hoey v. Gilroy*, 129 N. Y., 132.) Thus the town, village or city authorities may, if empowered by statute, authorize and regulate the use of awnings, stands for the exhibition of goods and the like, in the public streets. But apart from these exceptions "public highways belong, from side to side and end to end, to the public." Any permanent or unnecessary obstacle to travel in a street or highway is a nuisance although space may be left for the passage of the public. The public are not confined to the traveled roadway. Thus a bay-window project-

ing three or four feet beyond the line of the street has been held a public nuisance, which a municipal ordinance, without authority of statute could not justify. (Reimer's Appeal, 100 Pa. St., 182.) Although the power to authorize obstructions may be delegated to a municipality, in the absence of a provision of law on the subject, a municipality has no more right to license or maintain a nuisance than an individual, and for a nuisance maintained on its own property, a municipality is liable the same as an individual. Nor does a municipal ordinance declaring a thing a nuisance necessarily make it one. No length of time will legalize a public nuisance, such as the obstruction of the highway, or give the party maintaining it a right to continue it.

Carrying on business in highway.—The legislature may authorize certain obstructions in the street or highway for business convenience, and apart from legislative authority a temporary occupation of a part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, is allowed from the necessity of the case. (Welch v. Wilson, 101 N. Y. 254; Callanan v. Gilman, 107 N. Y. 360; Flynn v. Taylor, 127 N. Y. 596; Hoey v. Gilroy, 129 N. Y., 132; Tinker v. N. Y., O. & W. R. R. Co., 157 N. Y., 312.) So, one who has occasion to leave a load in a highway must remove it with promptness. If he let it remain there an unreasonable length of time it may be removed as a nuisance.

It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must be reasonable with reference to the rights of the public. (Callahan v. Gilman, 107 N. Y., 360.) The court said in a certain case where a wagoner was convicted of occupying one side of a public street, before his warehouse, several hours a day, in loading and unloading wagons: "If the nature of the defendant's business was such as to require the loading and unloading of so many more wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." (Rex v. Russell, 6 East., 427.)

It is doubtful if the sidewalk can properly be occupied by wagons, even for a temporary and necessary business purpose. "The sidewalk is constructed for and allotted to the use of pedestrians, and its obstruction by defendants backing teams across it to load and unload goods from their store cann-

justified on the ground that it is necessary.” (Richardson v. Barstow, 36 N. Y. St. Rep. [Sp. Term], 983.)

§ 105. How removed and liability for not removing.—The commissioner of highways shall serve upon the owner or occupant of lands, adjoining that part of a highway within their town, in which any obstruction or encroachment may exist, including any fences, brush, shrubbery or other obstruction causing the drifting of snow, and branches of trees overhanging the traveled portion of the highway so as to interfere in any manner with persons riding or driving over said highway, a notice specifying the extent and location of such obstruction or encroachment and directing such owner or occupant to remove the same within a specified time not more than sixty days after the service of the notice. If such owner or occupant shall neglect or refuse to remove such obstruction or encroachment within such time, he shall forfeit to the town the sum of twenty-five dollars; and the commissioners may remove such obstructions or encroachments at the expense of the town which may be recovered by action of such owner or occupant, or the said commissioner may bring an action in any court of competent jurisdiction to compel such owner or occupant to remove such obstruction or encroachment. Actions by commissioners of highways as in this section provided, shall be in the name of the town. (Amended by L. 1904, chap. 478, in effect April 28, 1904.)

Amendment of 1904.—The amendment of 1904 expressly included in the definition of an obstruction or encroachment: “any fence, brush, shrubbery or other obstruction causing the drifting of snow, and branches of trees overhanging the traveled portion of the highway so as to interfere in any manner with persons riding or driving over said highway.”

Weeds, briers and brush to be cut semi-annually. Highway L. §§ 53a, p. 120; §§ 70, 71, p. 143.

Removal of obstructions by commissioners.—When obstructions to public travel are found within the bounds of a highway, the commissioners are clothed with power to remove them without beginning an action, even though travel be not entirely prevented. *Cook v. Harris*, 61 N. Y., 448; *Hathaway v. Jenks*, 67 Hun. 289; 22 N. Y. Supp. 421; *Van Wyck v. Lent*, 33 Hun. 301. The choice of remedies is with the commissioners. *Flood v. Van Wormer*, 47 N. Y. 284.

Notice.—A notice under § 105 must be given before removal by commissioner. *Olendorf v. Sullivan*, 36 St. Rep. 74; 13 N. Y. Supp. 6. The sufficiency of the notice of course depends upon the facts of each case. In *Town of Sardinia v. Butler*, 78 Hun. 527, the notice was, in substance, "that the highway commissioner having ascertained that the highway was encroached upon, on the north side, along the defendant's land, had caused a survey to be made and had ascertained the north-easterly bounds of the highway along the defendant's land, "and that said fence or fences encroached upon said highway along the whole of your said lands to the westerly line thereof at different distances, ranging from seven feet four inches to fifteen feet (as more particularly appears by reference to a map thereof now in my possession, and which you are at liberty to inspect at any time), and that all the narrow strip or piece of land which lies under said fence or fences, and between said fence or fences and the northerly line of said highway, is a part of the public highway aforesaid." The direction was to remove the fence within twenty days. The description was held to be sufficiently definite by the appellate division, but the decision was reversed by the Court of Appeals, 149 N. Y. 505, the court saying: "A notice or order requiring the removal of such an encroachment must contain a precise and certain description of the particulars of the encroachment to such an extent, at least, as will enable the party upon whom it is served to go upon the ground and fix the place and extent of the encroachment with certainty and without embarrassment." All the earlier authorities are reviewed.

The notice may be in the following form:

FORM NO. 90.

Notice to Remove Obstruction.

To T. W.:

You are hereby notified by the undersigned commissioners of highways of the town of in the county of that the highway in highway district No. ... in said town adjoining the premises owned (or occupied) by you (state where) have been encroached upon (or obstructed) to the extent of (state how much) by

the erection of a (or as the case may be) and you are hereby directed to remove the same within days (not more than sixty) after the service of this notice.

Dated this day of 19.....

A. B.,
C. D.,
E. F.,

Commissioners of Highways.

Rights of individuals in the abatement of encroachments.—An obstruction to a highway is a nuisance and a person injured may sue for its abatement. Wakeman v. Wilbur, 147 N. Y. 657; 71 St. Rep. 265; Adams v. Popham, 76 N. Y. 410; Chipman v. Palmer, 77 N. Y. 51.

Ordinarily a person who is not specially injured has no right to abate a nuisance in the highway; but if an encroachment interferes with a person's individual right, as the right to travel along the highway, he may, it seems, remove the encroachment. Thus, if a highway is obstructed by a gate, a traveler may remove it in order to pass. He has no right to convert an obstruction to his own use. It is safest before proceeding to abate a nuisance without resort to law, to give notice to the responsible party, but it seems this is not essential to one who has unlawfully obstructed a highway.

Penal liability.—By the Penal Code an obstruction is made a public nuisance, and the person maintaining it is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars, or by not more than one year's imprisonment, or by both. (Penal Code, §§ 385, 387.)

Civil liability for injuries occasioned by obstruction.—A person maintaining a nuisance in a highway is liable in damages to a person who by reason thereof has sustained a special injury. Thus an individual who receives a bodily hurt, or suffers damage to his horse or carriage in consequence of a collision with an obstruction in the highway is specially injured and may maintain an action against the author of the obstruction. But the injury must be special in its nature, and not a damage which is sustained by the rest of the community as well. Lansing v. Smith, 8 Cow., 146; Butler v. Kent, 19 John., 223; Pierce v. Dart, 7 Cow., 609; Mills v. Hall, 9 Wend., 315.

§ 106. Private road.—An application for a private road shall be made in writing to the commissioners of highways of the town in which it is to be located, specifying its width and location, courses and distances, and the names of the owners and

occupants of the land through which it is proposed to be laid out.

Private ways considered.—A private way is a way over another person's land over which one person or a particular description of persons may pass in some particular line.

Private ways may arise:

1. By necessity.
2. By prescription.
3. By grant.
4. By statutory proceeding.

Private way by necessity.—It is a well established principle of law, that where lands are granted to a man, he is entitled to a passage-way to and from such lands. If one party sell to another, land which is inclosed on all sides, the party to whom such a conveyance is made may pass over the lands of his grantor in going to and coming from his own lands. This right of way, however, must be strictly necessary and its necessity must not be created by the party claiming the right of way. It does not exist where a man can reach his property through his own land. A right of way thus created by necessity continues no longer than the existence of the necessity which created it.

The fact that the way continues to be a convenient way is not sufficient to entitle its retention if it ceases to be indispensable as a means of access to the land.

Private way by prescription.—A private way by prescription is created by the uninterrupted use and enjoyment for twenty years of a passage over another person's land under a claim of right, with the knowledge and acquiescence of the owner. The enjoyment of a way for more than twenty years by license or permission of the owner confers no right by prescription. The user must be confined to one certain tract in order to establish such a right of way.

Private way by grant.—A private road is created by grant where the owner of a piece of land grants to another the right of passing over his land in a particular direction. The grantor may limit the right as he pleases and a right of way for one purpose does not necessarily include a right of way for another purpose. In such cases the grantor must afford reasonable facilities for the enjoyment of the way by the grantee. (*Bakeman v. Talbot*, 31 N. Y., 368.)

A grant of a right of way is made by deed. The grantee must keep the private road in repair. (*Bakeman v. Talbot*, 31

N. Y., 366.) He can not deviate from the way and go upon another part of the grantor's land when the way becomes impassable, whether the obstructions are accidental or the act of the owner of the soil. (*Williams v. Safford*, 7 Barb., 309; *Bakeman v. Talbot*, 31 N. Y., 366.)

A right of way acquired by deed can not be lost by non-user. It may, of course, be lost by an adverse holding for twenty years. (*Smyles v. Hastings*, 22 N. Y., 224.)

Private way by statutory proceeding.—A fourth method of creating a private road is by statute. Section 7, Art. I. of the constitution provides that "private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of free-holders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited." In proceedings under the statute to lay out a private road, exact and technical accuracy is not required, but simply a substantial compliance with the statute. A description in an application by reference to a private way used by permission of the owner of the land for a great number of years, so that it has come to be called a road, is sufficiently definite. The courses need not be specified in the application by the compass in degrees and minutes; and where the general course is given as easterly, etc. and the exact course and distance can be determined from other particulars in the application, or by natural monuments referred to, there is substantial compliance with the statute. *Slattery v. Winne*, 101 N. Y., 218; *People v. Taylor*, 34 Barb., 481.

Form of application.—The application to lay out a private road may be in the following form:

FORM NO. 91.

Application to lay out private road.

To the Commissioners of Highways of the Town of , in the County of

The undersigned, who is liable to be assessed for highway labor in your town, hereby makes application to you to lay out a private road for his use and benefit, beginning (insert description, giving its width and location, courses and distance) and said proposed road will run through the land of T. W., occupied by R. S.

Dated this day of , 19....

L. M.

§ 107. Jury to determine necessity and assess damages.—One or more of the commissioners to whom the application shall be

made, shall appoint as early a day as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected for the purpose of determining upon the necessity of such a road, and to assess the damages by reason of the opening thereof.

§ 108. Copy application and notice delivered to applicant.— Such commissioner shall deliver to the applicant a copy of the application to which shall be added a notice of the time and place appointed for the selection of the jury, addressed to the owners and occupants of the land.

Form of notice.—The following form may be used for the notice:

FORM NO. 92.

Notice of Application to Lay Out Private Road.

To T. W., Owner, and R. S., Occupant:

L. M., of the town of , in the county of , having made written application to us, the undersigned, as commissioners of highways of said town, to lay out a private road for his use and benefit in said town, a copy of which is hereto attached, you are hereby notified that a jury will be selected at the house of , in said town, on the day of , 19...., at o'clock in the noon, for the purpose of determining upon the necessity of such road, and assessing the damages therefor.

Dated this day of , 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 109. Copy and notice to be served.—The applicant on receiving the copy and notice shall, on the same day, or the next day thereafter, excluding Sunday and holidays, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who reside in the same town a copy thereof, or in case of his absence, by leaving the same at his residence, and upon such as reside elsewhere, by depositing in the post-office a copy thereof to each, properly inclosed in an envelope, addressed to them respectively at their post-office address, and paying the postage thereon, or, in case of infant owners, by like service upon their parent or guardian.

Affidavit of service.—The following form for the affidavit of service may be used:

FORM NO. 93.

Affidavit of Service of Notice of Application to Lay Out Private Road.

COUNTY OF } ss.:
Town of }

L. M., being duly sworn, says that he served the application and notice hereto attached on T. W. and R. S., on the day of 19...., by delivering to and leaving with each of them, copies of the same (or if served by leaving copies at the residence, so state).

Subscribed and sworn to before me,
this day of, 19....
G. H.,
Justice of the Peace.

§ 110. List of jurors.—At such time and place, on due proof of the service of the notice, one or more of the commissioners shall present a list of the names of thirty-six resident freeholders of the town, in no wise of kin to the applicant, owner or occupant, or either of them, and not interested in such lands. (Amended by L. 1904, chap. 109, in effect March 23, 1904.)

Amendment of section.—The amendment of 1904 made in view of the increase in the number of the jury from six to twelve. See next section as amended.

§ 111. Names struck off.—The owners or occupants of the land may strike from the list not more than twelve names, and the applicant a like number; and of the number which remain, the twelve names standing first on the list shall be the jury. (Amended by L. 1904, chap. 109, in effect March 23, 1904.)

Amendment of 1904.—The amendment of 1904 increased the number of jury from six to twelve.

§ 112. Place of meeting.—The commissioner or commissioners present, shall then appoint some convenient time and place for the jury to meet, and shall summon them accordingly.

Form of summons.—The following form may be used for the summons:

FORM NO. 94.

Summons of Jurors to Determine Necessity of Laying Out Private Road.

COUNTY OF } ss.:
Town of }

To (insert the names of the twelve jurors selected):

You are hereby summoned and required to appear at the in said town of on the day of 19.... at o'clock in the noon, to form a jury of freeholders to determine as to the necessity of laying out a private road through the lands of T. W., on the application of L. M., and to assess the amount of damages sustained by reason of such opening, if it is determined to open the same.

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

§ 113. Jury to determine and assess damages.—At least one commissioner and all the persons named and summoned on such jury, shall meet at the time and place appointed; but if one or more of the twelve jurors shall not appear, the commissioner or commissioners present shall summon so many qualified to serve as such jurors as will be sufficient to make the number present twelve to forthwith appear and act as such; and when twelve shall have so appeared, they shall constitute the jury, and shall be sworn well and truly to determine as to the necessity of the road, and to assess the damages by reason of the opening thereof. (Amended by L. 1904, chap. 109, in effect March 23, 1904.)

Amendment of 1904 made in view of the increase of the number of the jury from six to twelve.

Oath to jurors.—Before entering upon their duties the jurors shall take the following oath:

FORM NO. 95.

Oath of Jurors to Determine Necessity of Laying Out Private Road.

You do solemnly swear, in the presence of the ever-living God (or affirm) that you will well and truly determine as to the necessity of a private road across the lands of T. W., as has been applied for by L. M., and that you will well and truly assess the damages occasioned by the opening of such road.

§ 114. Their verdict.—The jury shall view the premises, hear the allegations of the parties, and such witnesses as they may produce, and if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the commissioners.

Oath to witnesses.—The following oath may be administered to witnesses appearing before such jury:

FORM NO. 96.

Oath of Witnesses Before Private Road Jury.

You do solemnly swear (or affirm) that the evidence you shall give, touching the necessity of laying out the private road as applied for by L. M., and the damages to be sustained thereby, shall be the truth, the whole truth, and nothing but the truth, so help you God.

Form of verdict.—The following form may be used for their verdict:

FORM NO. 97.

Verdict of Private Road Jury.

COUNTY OF } ss.:
Town of

We, the undersigned, being twelve disinterested freeholders of the said town of, having met on the day of 19...., at the house of, in said town, and having been duly sworn, well and truly to determine as to the necessity of the private road described in the application of L. M., a copy of which is hereto attached, and having viewed the premises through which it is proposed to be laid out, and having heard the parties and evidence produced, do hereby certify that in our opinion it is necessary and proper to lay out a private road for the use and benefit of L. M., pursuant to his said application, and we assess the damages of T. W. at \$.....

Dated this day of, 19....

(The twelve jurors sign here.)

§ 115. Value of highway discontinued.—If the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway running through the lands belonging to a person through whose lands the private road is proposed to be opened, the jury shall take into consideration the value of the highway so discontinued, and the benefit resulting to the person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening laying out of such private road.

§ 116. Papers to be recorded in the town clerk's office.—The commissioners shall annex to such verdict the application, and their certificate that the road is laid out, and the same shall be filed and recorded in the town clerk's office.

Certificate of highway commissioners.—The certificate of the highway commissioners may be in the following form:

FORM NO. 98.

Statement of Highway Commissioners Laying Out Private Road.

Whereas, L. M. did present to us as commissioners of highways of the town of In the county of a written application to lay out a private road in said town for his use and benefit, in after described; and twelve disinterested freeholders having considered, after due notice to the owners and occupants of the lands through which said road is proposed to be laid, and after viewing said road and hearing the parties and witnesses produced, certified that said road is necessary and proper, and assessed the damages to be paid thereby, which certificate was dated the day of and duly filed with said application, in the office of the town clerk of said town; and no motion has been made to the county court to confirm, vacate or modify (or as the case may be).

Now, therefore, we, the undersigned, commissioners of highways of said town, pursuant to section 116 of the highway law, do hereby lay said private road as so applied for and certified to, whereof a survey has been made as follows, (here insert survey bill) and the line of said road is to be the center of the road, which is to be rods in width.

Dated this day of 19.....

A. B.
C. D.
E. F.

Commissioners of Highways.

§ 117. Damages to be paid before opening the road.—The damages assessed by the jury shall be paid by the party for whose benefit the road is laid out, before the road is opened or laid; but if the jury shall certify that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, such damages shall be paid by the town, and refunded to the applicant.

§ 118. Fees of officers.—Every juror, in proceedings for a private road, shall be entitled to receive for his services one dollar and fifty cents; and commissioners of highways, their diem compensation, to be paid by the applicant.

§ 119. Motion to confirm, vacate or modify.—Within thirty days after the decision of the jury shall have been filed in the town clerk's office, the owner or occupant may apply to the county court of the county wherein such private road is situated, for an order confirming, vacating or modifying their decision; and such court may confirm, vacate or modify such decision as it shall deem just and legal. If the decision is vacated, the court may order another hearing of the matter before another jury, and remit the proceeding to the commissioners of highways of the same town for that purpose. If no such motion is made, the decision of the jury shall be deemed final. The motion shall be brought on, upon the service of papers on the adverse party in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein, and the decision of the county court shall be final, except that a new hearing may be had, as herein provided. If the final decision shall be adverse to the applicant, no other application for the same road shall be made within two years.

Proceedings on motion.—The same proceedings are taken on this motion as are taken in the case of a proceeding to lay out a public highway, and reference may be had to the forms given on pages 000-000 for suggestions as to the forms to be used on this motion.

§ 120. Costs of new hearing.—If upon a new hearing, the damages assessed are increased, the applicant shall pay the costs and expenses thereof, otherwise the owner shall pay the same.

§ 121. For what purpose private road to be used.—Every such private road when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road; nor shall the occupant or owner of the land through which said road shall be laid out, be permitted to use the same as a road, unless he shall have sig-

nified such intention to the jury who assessed the damages for laying out such road, and before such damages were assessed.

§ 122. Highways or roads along division lines.—Whenever a highway or private road shall be laid along the division line between lands of two or more persons, and wholly upon one side of the line, and the land upon both sides is cultivated or improved, the persons owning or occupying the lands adjoining such highway or road, shall be paid for building and maintaining such additional fence as they may be required to build or maintain, by reason of the laying out and opening such highway or road; which damages shall be ascertained and determined in the same manner that other damages are ascertained and determined in the laying out of highways or private roads.

§ 123. Adjournments.—If any accident shall prevent any of the proceedings required by this chapter relating to the laying out, altering or discontinuing of a highway, or the laying out a private road, to be done on the day assigned, the proceedings may be adjourned to some other day, and the commissioner shall publicly announce such adjournment.

ARTICLE V.

Bridges.

Section 130. When bridge is town or county expense.

- 131. Repealed by county law.
- 132. Statement of expenses.
- 133. Supervisors to levy taxes.
- 134. Joint liabilities of towns, and their joint contracts.
- 135. Refusal to repair.
- 136. Proceedings in court.
- 137. Commissioners to institute proceedings.
- 138. Their duty.
- 139. Commissioners to report.
- 140. Appeals.
- 141. Power of court on appeal.
- 142. Refusal to repair bridge.
- 143. Penalty and notice on bridge.
- 144. Offense.
- 145. Iron bridges.

§ 130. When bridge is town or county expense.—The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges constructed over streams or other water within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses. When such bridges are constructed over streams or other waters forming the boundary line between a city of the third class and a town, such city and town shall be liable each to pay its just and equitable share of the expenses for the construction, maintenance and repair of such bridges. Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article. Each of the counties of this state shall also be liable to pay for the construction, care, maintenance, preservation and repair of public bridges, lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expenses of such construction, care, maintenance, preservation and repair. (Amended by L. 1895, chap. 416, and L. 1902, chap. 321.)

The general scope of the section is, first, to declare the general liability of towns as to the construction and repair of public free bridges within its boundaries; second, to declare the liability of towns as between themselves as to bridges constructed upon boundary lines; and, third, to impose a liability upon the county for the construction and maintenance of public bridges over streams or other waters forming its boundary lines.

Liability of county.—Prior to the amendment of the above section in 1895, there was also imposed upon the county a fixed liability based upon the relation between the cost of town bridges and their maintenance, and the taxable value of the

property within the town. The amendment of 1895 eliminated this liability and the county is now only absolutely liable to contribute for the construction and maintenance of bridges over county boundary lines. Under § 63 of the County Law, post, p. 259, a board of supervisors may cause a sum of money not exceeding \$2,000 in any one year to be raised by the county to aid a town in the construction and repair of its bridges, where, in its opinion, such town would be unreasonably burdened by the expense thereof. And it is also provided in section 64 of the County Law, post p. 260, that where a bridge is destroyed by the elements, and the cost of re-construction would be too burdensome upon the town, the board of supervisors may provide for the construction and completion of a bridge, and all necessary approaches thereto, at or near the site of the bridge so destroyed.

Powers and duties of commissioners as to bridges.—Highway commissioners, within the limits of their power to bind the town may construct new bridges connecting with existing highways, and such as it is the duty of the town to make and keep in repair. *Mather v. Crawford*, 36 Barb. 564. The commissioners are not required to build or repair bridges when they have no money in their hands for such purpose. *People v. Hudson*, 7 Wend. 474, and see cases cited under section 16 of the Highway Law, ante p. 65. But where provision is made for the erection or construction of a bridge, the commissioners of highways are charged with full power in respect thereto. *Berlin Iron Bridge Co. v. Wagner*, 57 Hun. 346. After a town board has given its consent to the erection or repair of a bridge, its powers and duties in relation thereto are at an end, and it cannot direct its commissioners as to the manner of construction. *People ex rel. Groton Bridge Co. v. Town Board*, 92 Hun. 585. The power conferred upon a board of supervisors under section 62 of the County Law, post p. 257, as to the location of a bridge, does not deprive the commissioner of his power to contract for the erection of a bridge connecting the ends of the highways which are interrupted by a stream of water. *Huggans v. Riley*, 125 N. Y. 88.

Powers of board of supervisors.—Originally, and as one of the attributes of state sovereignty, the power to lay out highways and to build bridges connecting them over streams, for the use of the public, and to levy taxes for that purpose, belonged to the state legislature, and, in the exercise of its own discretion, it could delegate the exercise of such power to boards of supervisors. It was therefore formerly held that the board of super-

visors of a county having within it two towns separated by a stream, may, upon proper application of one of such towns, enact a law authorizing and compelling the erection of a bridge over said stream to connect highways in said towns, and imposing a tax upon said towns to pay the expense thereof, although the officers of one of the towns and a majority of its taxpayers are opposed, and they expressed their dissent by a vote at a regular town meeting. *Town of Kirkwood v. Newbury*, 122 N. Y. 571.

Bridges over boundary lines of towns.—The general rule is that the expense of constructing and maintaining bridges over the boundary lines of towns must be equally borne by the towns. *People ex rel Root v. Supervisors*, 81 Hun. 216, aff'd 146 N. Y. 107. The above section only requires contribution upon the part of the towns where the bridge is constructed over a stream forming a boundary line, one end of which is in the town sought to be charged with the cost of the construction and maintenance thereof. It does not apply where neither end of the bridge is in a town, although the middle pier rested on land located within such town. *Town of Candor v. Town of Tioga*, 11 App. Div. 502. The court in this case said:—"This statute should have a reasonable construction. It is difficult to believe that the legislature intended to make a town liable for the expense of constructing a bridge which does not connect with any land within its boundaries, or with any highway therein, and which is, in fact, inaccessible therefrom, merely because the commissioners of highways of adjoining towns, for their own convenience and purposes, choose to build a bridge, the middle part of which passes over a small strip of land within its boundaries."

The cost of a bridge between two towns over a stream that is not navigable tide water should be divided between them equally, without considering the relative population and taxable property. *Matter of Spier*, 20 N. Y. St. Rep. 389, 3 N. Y. Supp. 438, aff'd 115 N. Y. 665. The approaches to a bridge are a part thereof, and under the above section the towns will be jointly liable for the expense of maintaining such approaches in proper repair, although the amount expended is upon only the approach situated in one of the towns. *Edwards v. Fort*, 22 App. Div. 277.

Construction of bridges between towns and cities of over 1,500,000 inhabitants.—Whenever the highway commissioners having power in the premises under this act shall decide that the public convenience requires a bridge to be constructed over the

stream or waters dividing a city from a town or any incorporated village in said town, the same shall be constructed under and according to the provisions of the highway law for the construction of bridges between towns, being article five of chapter nineteen of the general laws, the common council of the city being the highway commissioners of said city, and the board of village trustees of any incorporated village in the town being the highway commissioners of said village. (L. 1897, chap. 269, § 1.)

Any land required for the approaches of said bridges for a distance not exceeding three hundred feet from the bridge, may be bought by the commissioners of highway constructing the bridge, the approaches constructed and the cost thereof included in the cost of the bridge. (Idem § 2.)

When an agreement can not be made as to the price to be paid for the land for such approaches, the said land shall be condemned in the manner as provided by chapter ninety-five, laws of eighteen hundred and ninety, with the acts amendatory thereof. The expenses of said condemnation proceedings shall be included in and be a part of the cost of the bridge. (Idem § 3.)

In order to pay for the said bridges, the city and town shall each have the power to issue bonds, to be known as bridge bonds of the said city and town, respectively, by the officers thereof, and in the manner provided by law for the issue of other bonds of said city and of said town, to an amount necessary to pay their respective proportions of the cost of said bridges, which shall be borne by said city and town in the proportion of their equalized assessed valuation of taxable property, at the time of the final resolution of said city and town, authorizing the construction of the said bridges. The total amount of such bonds to be issued by the city shall not exceed thirty thousand dollars, or by a town, twenty thousand dollars. Said bonds shall not be sold for less than the par value thereof, and accrued interest, if any; shall mature and be payable at a time not over thirty years from date; be of such denominations and bear such interest, not exceeding five per centum per annum, as the common council of the city, in case of a city; or the town board, in case of a town, shall determine. The proceeds of the said bonds shall be paid to the proper officer for receiving funds of each municipality, and credited to a fund which shall be known as the bridge fund, and shall only be paid out by warrants, as other funds of said city or town are paid out. (Idem. § 4, as amended by L. 1898, chap. 591; L. 1899, chap. 232.)

This act shall apply only to towns from which at least one-quarter of the territory thereof has heretofore been taken for park purposes, and which also adjoin a city containing at the time of the taking of the last federal census a population of one and one-half million. (Idem, § 5.)

§ 131. Additional county aid (Repealed by County Law, and re-enacted in County Law, § 63, post.)

§ 132. Statement of expenses.—The commissioners of highways of every town in which the whole or any part of any free bridge may be, shall make and deliver to the supervisor of the town, on or before the first day of November in each year, a written statement, verified by one of them, containing a description of such bridge, the whole expense in items incurred by the town during the year preceding for its construction or repair.

The statement of the expense incurred by a town for the construction or repair of bridges may be in the following form:

FORM NO. 99.

Statement to the Supervisor of Expenses Incurred in Repair and Construction of Bridges.

We, the undersigned, commissioners of highways of the town of in the county of pursuant to section 132 of the Highway Law, hereby render to the supervisor of said town a statement of the expenses incurred by us in the erection and repair of the free public bridges of said town as follows: (Here give an itemized account of the expenses incurred on each of the bridges.)

Dated this day of 19....

A. B.,

C. D.,

E. F.,

Commissioners of Highways.

STATE OF NEW YORK, } ss.
County of

A. B., one of the commissioners of highways of said town, being duly sworn, says the foregoing statement, which is subscribed by him, is true.

A. B.

Subscribed and sworn to before me, }
this day of 19.... }

G. H..

Justice of the Peace.

§ 133. Supervisors to levy tax.—Every supervisor to whom such statement is delivered shall present the same to the board of supervisors of his county at its next annual session thereafter, and the board of supervisors shall levy upon the taxable property of the county a sum sufficient to pay its proportion of such expense, and the same when collected shall be paid to the commissioners of highways of such town to be applied toward the payment of such expense.

§ 134. Joint liabilities of towns, and their joint contracts.—Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines. The commissioners of highways of all the towns or of one or more of such towns, the others refusing to act, may enter into a joint contract for making and repairing such bridges.

Joint expense of maintaining bridges.—The provision of the above section that bridges over boundary lines shall be maintained at the joint expense of the towns, without reference to town lines, imposes the expense equally upon the towns, without regard to the portion of the bridge located in either. *Lapham v. Rice*, 55 N. Y., 472; *Day v. Day*, 94 N. Y. 153. No such joint liability exists unless there is at the time a lawful highway in each town, which would be connected by and of which the bridge would form a part. The mere fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare suitable for travel. (*Beckwith v. Whalen*, 70 N. Y., 430; *People ex rel. Keene v. Supervisors*, 151 N. Y. 191, 192.) The approaches of the bridge are a part thereof and are to be maintained at the joint expense of the two towns. (*Edwards v. Ford*, 22 App. Div. 277.) The spirit of the statute appears to be that the commissioners of highways for the several towns interested shall act for their towns, and that they shall, on behalf of their respective towns, enter into a joint contract for the construction of such bridges, each town providing for the payment of its equal portion of the cost of such bridges, without reference to the question of what portion

of any such bridge may be within the jurisdiction of any particular town. (*Marshall v. Haywood*, 74 App. Div. 27.)

§ 135. Refusal to repair.—If the commissioners of highways of either of such towns, after notice in writing from the commissioners of highways of any other such towns, shall not within twenty days give their consent in writing to build or repair any such bridge, and shall not within a reasonable time thereafter do the same, the commissioners of highways giving such notice may make or repair such bridge, and then maintain an action in the name of the town, against the town whose commissioners neglect or refuse to join in such making or repairing, and in such action, the plaintiffs shall be entitled to recover so much from the defendant, as the town would be liable to contribute to the same, together with costs and interest.

Notice to repair.—Where a commissioner of highways upon the application of the commissioner of another town, has absolutely refused to aid in the construction of a bridge, when it becomes necessary, he thereby waives notice, and the other commissioner may rebuild the bridge and maintain an action against the town refusing, to recover half the expense. *Day v. Day*, 94 N. Y., 153. See also *Clapp v. Town of Ellington*, 87 Hun. 542, holding that a commissioner who has refused to help in the repair of a bridge may be treated as having waived the statutory notice.

Maintenance of action.—An action is not maintainable under the above section unless all the conditions imposed by statute are complied with. If the commissioner making the repairs did not request the commissioner of the other town to aid him, there will be no liability of such town to contribute toward the cost of such repair. (*Flynn v. Hurd*, 118 N. Y., 19.) An action will lie under the above section where the commissioners of one of the towns, though having met with the commissioners of the other towns, and agreed to join in the repair, yet have neglected to pay their share of the expense. (*Surdam v. Fuller*, 31 Hun., 500.) The complaint need not allege that the defendant towns had money with which to pay their share of the joint expense. (*Oakley v. Town of Marmaroneck*, 39 Hun., 448.)

Notice to commissioners of adjoining towns to rebuild or repair a bridge, and the consent thereto, may be in the following forms:

FORM NO. 100.

Notice to Commissioners of Adjoining Towns.

To the Commissioners of Highways of the Town of in the County of

Whereas, the bridge (here describe it) has become, and is, unsafe for public use and travel (state in what respect), you are hereby notified and required to join with the undersigned commissioners of the town of in the county of, in rebuilding (or repairing) said bridge, and to give your consent in writing to the same within twenty days after the service of this notice, pursuant to section 135 of the Highway Law.

Dated this day of 19....

A. B.,
C. D.,
E. F.,

Commissioners of Highways of the town of

FORM NO. 101.

Consent to Rebuild or Repair Bridge.

To the Commissioners of Highways of the Town of in the County of

Pursuant to your notice served on us, dated the day of 19...., and to section 135 of the Highway Law, we, the undersigned commissioners of highways of the town of in the county of hereby consent to join with you in rebuilding (or repairing) the (designate the bridge) it being the same bridge mentioned in your said notice.

Dated this day of 19....

A. A.,
B. B.,
C. C.,

Commissioners of Highways of the town of

§ 136. Proceedings in court.—Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the commissioners of highways in each of such towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of the commissioners, at least eight days before the hearing, may apply to the supreme court at a special term thereof, to be held in

the judicial district in which such bridge, or any part thereof, shall be located, for an order requiring such commissioners to build, rebuild or repair such bridge, and the court upon such motion may, in doubtful cases, refer the case to some disinterested person to ascertain the requisite facts in relation thereto, and to report the evidence thereof, to the court. Upon the coming in of the report, in case of such reference, or upon or after the hearing of the motion, in case no such reference shall be ordered, the court shall make an order thereon as the justice of the case shall require. If the motion be granted in whole or in part, whereby funds shall be needed by the commissioners to carry the order into effect, such court shall specify the amount of money required for that purpose, and how much thereof shall be raised in each town.

The above section is limited in its operation and effect to bridges over boundary lines between towns. If under other statutes bridges not on boundary lines are maintainable at the joint expense of towns, the proceedings authorized by the above section do not apply. (*Matter of Freeholders of Cattaraugus County*, 59 N. Y., 316.) Nor does it apply to bridges over bays or lakes or other bodies of water or causeways or bridges over marshes between two towns. (*Matter of Freeholders of Irondequoit*, 68 N. Y., 376, 379.) The remedy does not exist unless the bridge connects lawful highways. (*Matter of Montezuma*, 14 N. Y. Supp. 845.) The inability of the highway commissioners of the towns liable for the maintenance of the bridge to agree on the kind of material to be used in its repair is equivalent to a refusal, and justifies the application by freeholders. (*Matter of Towns of Mt. Morris and Castile*, 41 Hun. 29.) The court may in a proper case order the re-construction of a bridge in a proceeding instituted under the above section, without regard to the length of time which has elapsed subsequent to the destruction of the bridge. (*Matter of Commissioners, etc. of Towns of Glenn and Florida*, 3 N. Y. Supp. 461.) But an order should not be granted where the cost of rebuilding a bridge would be large, and the bridge would be liable to be destroyed by freshets, and but little dissatisfaction existed with the present mode of crossing the stream. *Idem.*

The petition of freeholders, the notice of motion for an order of the Supreme Court, and the form of affidavit to be used on such motion may be as follows:

FORM NO. 102.**Petition of Freeholders to Commissioners of Adjoining Towns.**

To A. B., C. D. and E. F., Commissioners of Highways of the Town of , in the County of , and A. A., B. B. and C. C., Commissioners of Highways of the Town of , in the County of :

We, the undersigned, L. M., N. O. and R. S., do respectfully, pursuant to section 136 of the Highway Law, petition and apply to you, and show that we are each of us freeholders of the said town of , and that the highway bridge known as the (here designate the bridge) which crosses the (name the stream) a stream forming the boundary line between said towns of and has become and is out of repair and is unsafe for public use and travel (state in what respects), that said bridge has been repaired and maintained at the joint expense of said towns, and said towns are jointly liable to make and maintain a bridge at said point.

And we hereby petition and apply to you, the said commissioners, to rebuild (or repair) the bridge at said point.

Dated this day of , 19....

L. M.
N. O.
R. S.

FORM NO. 103.**Notice of Motion.**

SUPREME COURT—County of

Application of L. M., N. O. and R. S. for
an order requiring the commissioners
of highways of the towns of
and to rebuild the bridge
known as

To A. B., C. D. and E. F., Commissioners of Highways of the Town of , in the county of , and A. A., B. B. and C. C., Commissioners of Highways of the Town of , in the County of :

Take notice that an application will be made to this court at a special term thereof, to be held at the court-house, in the of , on the day of , 19...., at the opening of the court on that day, for an order requiring you, the said commissioners, to rebuild (or repair) the bridge mentioned in the affidavit hereto attached, and requiring money to be appropriated or raised therefor, and for such other and further relief as to the court may seem just and proper. The application will be made on affidavit and papers, copies of which are herewith served on you.

Dated this day of , 19....

L. M.
N. O.
R. S.

FORM NO. 104.

Affidavit on Motion for an Order to Build a Bridge.

(Title as in preceding form.)
 STATE OF NEW YORK, } ss.:
 County of

L. M., N. O. and R. S., being severally and duly sworn, say that they are freeholders of the town of, said county, and that said town joins the town of, in the county of, and the (name the stream) forms the boundary line between said towns; that at (describe where) a free public bridge has been maintained at the joint expense of said towns, and said towns are jointly liable for the building, rebuilding, repair and maintenance of such bridge at such point; that such bridge is (describe the kind of bridge fully) and has become unsafe and unfit for public use and travel (describe fully the condition the bridge is in), and that in our opinion it would be more for the interests of the said towns to rebuild than to repair said bridge (or as the case may be); that on the day of 19...., the above-named affiants united in a petition to A. B., C. D. and E. F., commissioners of highways of said town of, and A. A., B. B. and C. C., commissioners of highways of the said town of, pursuant to section 136 of the Highway Law, which petition was duly served on each of said commissioners, and which requested them to rebuild (or repair) said bridge at said point; that thereafter and on the day of 19...., said commissioners served on us a written refusal as follows: (Here set forth the refusal); that in our opinion an (iron) bridge should be built, and that the expense should be between \$..... and \$..... (approximate the expense as nearly as possible and insert any other facts deemed necessary).

L. M.
 N. O.
 R. S.

Subscribed and sworn to before me, }
 this day of, 19.... }

G. H.,
 Notary Public.

FORM NO. 105.

Order of Court to Rebuild Bridge.

At a special term of the Supreme Court, held at the court-house in the of, on the day of, 19....
 Present:—Hon., justice.

(Title of case in Form No. 103.)

On reading and filing the affidavit of L. M., N. O. and R. S., dated the day of, 19...., setting forth that (here set forth the substantial facts of the affidavit), with proof of due service of a copy of said affidavit and notice of motion upon each of the commissioners of highways of said towns, and after hearing J. D., of counsel for said applicants, in favor of said motion, and D. B., of counsel (or no one appearing) for the said commissioners in opposition thereto,

It is hereby ordered, pursuant to section 137 of the Highway Law, that said commissioners build a (or repair) a (here describe the kind of bridge) at (here describe the place), at the joint expense of said towns, not to exceed dollars, and that one-half of the said expense shall be chargeable to each of said towns, to be assessed, levied and collected thereon, as other town charges are assessed, levied and collected.

§ 137. Commissioners to institute proceedings.—The commissioners of highways of any such town, may institute and prosecute proceedings under this chapter, in the name of the town, to compel the commissioners of such adjoining towns, to join in the building, rebuilding or repair of any such bridge, in like manner as freeholders are hereby authorized.

§ 138. Their duty.—The order for building, rebuilding or repairing a bridge being made, and a copy thereof being served on the commissioners of highways of such adjoining towns respectively, the commissioners of highways of such towns shall forthwith meet and fix on the plan of such bridge, or the manner of repairing the same, and shall cause such bridge to be built, rebuilt or repaired out of any funds in their hands applicable thereto; and if an adequate amount of funds are on hand, they shall cause the same to be built, rebuilt or repaired upon credit, or in part for cash and in part upon credit, according to the exigency of the case; and the commissioners may enter into a contract for building, rebuilding or repairing such bridge, pledging the credit of each town for the payment of its appropriate share, so far as the same shall be upon credit.

§ 139. Commissioners to report.—The commissioners of highways of each town, shall make a full report of their proceedings in the premises to the town board, at the time of making their annual report. They shall attach to the copy of the order granted by the supreme court, an accurate account under oath, of what has been done in the premises, and deliver the same to the supervisor of their town. The board of supervisors at their annual meeting, shall levy a tax upon each of such towns, when in the same county, and upon the appropriate town when in different counties, for its share of the costs of building, rebuilding or repairing such bridge, after deducting all payments actually made by the commissioners thereon; which tax, includ-

ing prior payments, shall in no case exceed the amount specified in the order.

§ 140. Appeals.—Either party aggrieved by the granting or refusing to grant such order by the court at special term, may appeal from such decision to the general term of the supreme court for the review of the decision. The general term may alter, modify or reverse the order, with or without costs.

§ 141. Power of court on appeal.—The special term may grant or refuse costs as upon a motion, including also witnesses' fees, referees' fees and disbursements. The appeal provided for in the last preceding section, shall conform to the practice of the supreme court, in case of appeal from an order of a special term, to the general term.

§ 142. Refusal to repair bridge.—Whenever any such bridge shall have been or shall be so out of repair as to render it unsafe for travelers to pass over the same, or whenever any such bridge shall have fallen down, or been swept away by a freshet or otherwise, if the commissioners of highways of the adjoining towns, after reasonable notice of such condition of the bridge, have neglected or refused, or shall neglect or refuse to repair or rebuild it, then whatever funds have been or shall be necessarily or reasonably laid out or expended in repairing such bridge, or in rebuilding the same, by any person or corporation, shall be a charge upon such adjoining towns, each being liable for its just proportion; and the person or corporation who has made such expenditure, or shall make such expenditures, may apply to the supreme court, at a special term, for an order requiring such towns severally to reimburse such expenditures, which application shall be made by serving papers upon the commissioners of highways of each of such towns at least eight days; and the court may grant an order requiring each of the

adjoining towns to pay its just proportion of the expenditure, specifying the same; and the commissioners of highways in each of such towns shall forthwith serve a copy of such order upon the supervisor of each of their towns, who shall present the same to the board of supervisors, at their next annual meeting. The board of supervisors shall raise the amount charged upon each town by the order, and cause the same to be collected and paid to such persons or corporation as incurred the expenditure. The order shall be appealable.

§ 143. Penalty and notice on bridge.—The commissioners of highways may fix and prescribe a penalty, not less than one, nor more than five dollars, for riding or driving faster than a walk on any bridge in their town, whose chord is not less than twenty-five feet in length and put up and maintain in a conspicuous place at each end of the bridge, a notice in large characters, stating each penalty incurred.

§ 144. Offense.—Whoever shall ride or drive faster than a walk over any bridge, upon which notice shall have been placed, and shall then be, shall forfeit for every offense the amount fixed by such commissioners and specified in the notice.

§ 145. Iron bridges.—No town or its officers shall be compelled to accept or pay for an iron or steel bridge exceeding two hundred feet in length, or having a span or spans exceeding one hundred feet in length, constructed therein or upon its borders, until the state engineer and surveyor shall certify to the completion of the bridge, pursuant to the contract under which it shall have been constructed, with his approval of the manner of its construction and the material thereof; and all contracts made for the construction of any such bridge shall be subject to the provisions of this section.

ARTICLE VI.**Miscellaneous Provisions.**

- Section 150. **Papers, where filed.**
- 151. When commissioners do not act.
 - 152. Costs on motion.
 - 153. Injuries to highways.
 - 154. When town not liable for bridge breaking.
 - 155. Steam traction engine on highway.
 - 156. Trees, to whom they belong.
 - 157. Law of the road.
 - 158. Intemperate drivers.
 - 159. Drivers, when to be discharged.
 - 160. Leaving horses without being tied.
 - 161. Owners of certain carriages liable for acts of drivers.
 - 162. Term "carriage" defined.
 - 163. Entitled to free use of highways.
 - 164. Penalties, how recovered.
 - 165. Stone and rubbish not to be dumped on highways.
 - 166-169b. Use of highways by automobiles. (Added by L. 1901, chap. 531 and repealed by Motor Vehicle Law [L. 1904, chap. 540].)

§ 150. **Papers, where filed.**—All applications, certificates, appointments and other papers relating to the laying out, altering or discontinuing of any highway shall be filed by the commissioners of highways as soon as a decision shall have been made thereon in the town clerk's office of their town.

§ 151. **When commissioners do not act.**—When any commissioner or other officer appointed by a court under this chapter shall neglect or be prevented from serving, the court which appointed him shall appoint another in his place.

§ 152. **Costs on motion.**—Costs of a motion to confirm, vacate or modify the report of commissioners appointed by the court to lay out, alter or discontinue a highway may be allowed in the discretion of the court not exceeding fifty dollars. Costs of any other motion in a proceeding in a court of record, authorized by this chapter, may be allowed in the discretion of the court not exceeding ten dollars.

§ 153. **Injuries to highways.**—Whoever shall injure any highway or bridge maintained at the public expense, by obstructing or diverting any creek, water-course or sluice, or by

dragging logs or timber on its surface, or by any other act, or shall injure, deface or destroy any mile-stone or guide-post erected on any highway, shall for every such offense, forfeit treble damages.

Mile-stones and guide posts.—Section five of the Highway Law, ante p. 34, authorizes commissioners of highways to cause mile-stones and boards to be erected upon highways. They are also required to cause guide posts, with proper inscriptions and devices, to be erected at the intersectings of highways. An injury to a mile-board, mile-stone or guide-post so erected is punishable by imprisonment for not more than two years. (Penal Code, § 639, p. 35.)

Provisions of penal code for protection of highways.

Public nuisance: defined.—A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission * * * * * unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a stream, creek or other body of water which has been dredged or cleared at public expense, or a public park, square, street or highway. (Penal Code, § 385.)

Maintaining a nuisance a misdemeanor: A person, who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who wilfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor. (Penal Code, § 387.)

Noisome or unwholesome substances, etc., in highway: A person who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both. (Penal Code, § 431.)

Injuring highways, mile-boards, guide-posts, etc.—A person who willfully or maliciously displaces, removes, injures or destroys.

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or,

* * * * *

6. A mile-board, mile-stone, or guide-post erected upon a highway, or any inscription upon the same;

* * * * *

is punishable by imprisonment for not more than two years. (Penal Code, § 639.)

Throwing substances injurious to animals in public place.—A person who willfully throws, drops or places, or causes to be thrown, dropped or placed, upon any road, highway, street or public place, any glass, nails, pieces of metal or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor. (Penal Code, § 661.)

Deposit of substances on highway.—Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, or shall cause or procure to be thrown, dropped or placed, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or place, any glass, tacks, nails, pieces of metal, brier, thorn or other substance which might injure or puncture any tire used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor, and on conviction be fined not less than five nor more than fifty dollars. (Penal Code, § 654a.)

§ 154. When town not liable for bridge breaking.—No town shall be liable for any damage resulting to person or property, by reason of the breaking of any bridge, by transportation on the same, of any vehicle and load, together weighing four tons or over; but any owner of such vehicle or load, or other person engaged in transporting or driving the same over any bridge, shall be liable for all damages resulting therefrom.

Railroad bridge.—This section does not apply to a bridge constructed by a railroad under § 11 of the Railroad Law, but only to a town bridge maintained at public expense. *Bush v. D. L. & W. R. R. Co.*, 166 N. Y. 210.

Liability for defects generally.—See § 16 of Highway Law, *ante*, and notes.

§ 155. Steam traction engines on highways.—The owner of a carriage, vehicle or engine, propelled by steam, his servant or agent, shall not allow, permit or use the same to pass over, through or upon any public highway or street, except upon railroad tracks, unless such owners, or their agents or servants, shall send before the same, a person of mature age, at least one-eighth of a mile in advance, who shall notify, and warn persons traveling or using such highway or street, with horses or other domestic animals, of the approach of such carriage, vehicle or engine; and at night such person shall carry a red light, except in incorporated villages and cities. This section shall not apply to any carriage or motor vehicle, propelled by steam, developing less than twenty-five horse power, other than a steam traction engine. (Amended by L. 1901, chap. 531, in effect April 25, 1901.)

Penal provision.—A person who willfully, * * * * * drives or leads along a public highway a wild and dangerous animal, or a vehicle or engine propelled by steam, except upon a railroad, along a public highway, or causes or directs such animal, vehicle or engine to be so driven, led, or to be made to pass, unless a person of mature age shall precede such animal, vehicle or engine by at least one-eighth of a mile, carrying a red light, if in the night time, and gives warning to all persons whom he meets traveling such highway of the approach of such animal, vehicle or engine; * * * * * shall be deemed guilty of a misdemeanor. (Penal Code, § 640.)

Warning of approach.—In an action for personal injuries occasioned by the fright of the plaintiff's horses caused by the approach of a steam roller, it was held to be a question for the jury whether reasonable care required warning of its approach to be given. Also held, upon the question whether warning was necessary, it was proper to consider the fact that § 155 of the Highway Law and § 640 of the Penal Code, recognized the necessity of such a warning and that the failure to give it was made a misdemeanor, as indicating the view which the people of the state have taken as to the necessity of such warning. *Mullen v. Village of Glen Falls*, 11 App. Div. 275; 42 N. Y.

Supp. 113. See also *Rice v. Buffalo Steel House Co.*, 17 App. Div. 462; 45 N. Y. Supp. 277.

Section does not apply to automobiles.—*Nason v. West*, 31 Misc. 583, 587.

§ 156. Trees, to whom they belong.—All trees standing or lying on any land over which any highway shall be laid out, shall be for the proper use of the owner or occupant of such land, except of them as may be requisite to make or repair the highway or bridges on the same land.

Cross-references.—Abatement of tax for planting shade trees along a highway. See *Highway L.*, § 44, ante. Commissioner of highways may authorize the location and planting of shade trees. *Highway L.*, § 43, ante.

Ownership of shade trees.—The owner of adjoining land may plant shade trees or otherwise improve or beautify the lands in the highways adjacent to his premises, provided there is no interference with the use of such highways. *Palmer v. Larchmont Elec. Co.*, 6 App. Div. 12. See also *Jackson v. Hathaway*, 15 John. 447; *Edsall v. Howell*, 86 Hun, 424. The presumption that the title of the abutter is to the center of the street is sufficient to establish the ownership of the trees along the highway. *McCruden v. Rochester Ry. Co.*, 5 Misc. 59, 25 N. Y. Supp. 114, aff'd 77 Hun, 609. See also *Village of Lancaster v. Richardson*, 4 Lans. 136. The right having once been given to the owner of lands adjoining a highway to plant shade trees along a highway, he is entitled to a continuance of the growth of such trees, and is protected against their destruction by any person including a highway officer. *Edsall v. Howell*, supra. And even if the owner of the abutting premises does not own the fee to the highway, if he sets out shade trees along the highway at his own expense with the sanction of the municipal authorities, he is entitled to have them protected against negligence or willful destruction at the hands of third parties and has a right in the nature of an easement for which he may recover compensation if he is deprived of it. The unlawful cutting down of shade trees in a highway is deemed in equity irreparable injury. *Lane v. Lamke*, 53 App. Div. 395; 65 N. Y. Supp. 1090.

Horses or other animals not to be hitched near shade trees.—It shall be unlawful for any person or persons whatsoever, in this state, to hitch any horse or other animal to, or leave the

same standing near enough to, to injure any fruit or forest tree that has been transplanted or used as a shade or ornamental tree around any school-house, church or public building, or along any public highway, or to cut down or mutilate, in any way, any such ornamental or shade trees, but the right of property owners along highways to cultivate, train and use such shade trees shall not be impaired or abridged hereby. (L. 1875, chap. 215, § 1, as amended by L. 1881, chap. 344.)

Punishment for violation of act.—Any person or persons guilty of violating the provisions of section one of this act shall be liable to prosecution by any person, before any justice of the peace in the town where the offense is committed, and punishable by a fine not exceeding ten dollars, nor less than one dollar, besides the costs of action for each offense or for each tree cut down or mutilated in violation of the provisions of this act; and every such penalty, when collected, shall be paid by the justice, one-half to the overseer of the poor of the town in which recovery was had, and the remainder to complainant, and the same process and means for the collection of the penalties imposed by this act may be issued and had as are now allowed by law for the collection of damages in actions of tort, but no provision of this act shall operate to interfere with any ordinance of the incorporation of villages and cities of this state, intended to secure the protection of shade trees therein. (L. 1875, chap. 215, § 2, as amended by L. 1881, chap. 344.)

§ 157. [Law of the road] (A) Whenever any persons, traveling with any carriages, or riding horses or other animals, shall meet on any turnpike road or highway, the persons so meeting shall seasonably turn their carriages, horses, or other animals to the right of the center of the road, so as to permit such carriages, horses, or other animals to pass without interference or interruption, (under the penalty of five dollars for every neglect or offense, to be recovered by the party injured).

(B) Any carriage, or the rider of a horse or other animal, overtaking another shall pass on the left side of the overtaken carriage, horse or other animal. When requested to do so, the driver or person having charge of any carriage, horse or other animal, traveling, shall, as soon as practicable, turn to the right,

so as to allow any overtaking carriage, horse or other animal, free passage on his left.

(C) In turning corners to the right, carriages, horses or other animals shall keep to the right of the center of the road. In turning corners to the left, they shall pass to the right of the center of the intersection of the two roads.

(D) Any person neglecting to comply with or violating any provision of this section shall be liable to a penalty of five dollars to be recovered by the party injured, in addition to all damages caused by such neglect or violation. (Amended by L. 1902, chap. 96.)

Amendment of section.—The amendment of 1902 materially changed the former section, which provided that persons meeting should seasonably turn their carriages to the right of the center of the road so as to permit passage without interference or interruption. Under this law it was held that the requirement to turn to the right did not apply to horseback riders. *Dudley v. Bolles*, 24 Wend. 405. In *Mooney v. Trow Directory Co.*, 2 Misc. 238; 21 N. Y. Supp. 957, it was said that the act probably did not apply to anyone except drivers of vehicles. The present law, however, applies to any person traveling with a carriage or riding horses or other animals. It was also held that the act did not require a person approaching from the rear and overtaking another person to turn to the left. *Savage v. Gerstner*, 36 App. Div. 220.

Center of road.—The center of the road means the center of the worked part of the road, and it is immaterial that one side was rougher than the other. *Earing v. Lansing*, 7 Wend. 185; *Pike v. Bosworth*, 7 N. Y. St. Rep. 665.

Rights of public in highway, generally.—The rights of the public to the use of the highway are substantially the same whether the fee is in the municipality or in the abutting owners. The public is entitled to an uninterrupted passage, subject only to the temporary obstruction of the highway for a reasonable time in cases of necessity. A right of passage is "the liberty of all citizens to pass and repass on foot, on horseback

and in carriages and wagons." The right also includes the right to drive horses and cattle along the highway. A citizen has a lawful right to drive herds of horses and cattle over the road, and if he uses ordinary care, diligence and skill he is not liable for injury done by the animals to adjoining property. (Elliott on Highways, p. 316.) If an abutting owner chooses to leave his land lying open, he does so subject to risk of cattle driven on the highway occasionally straying on his premises. (See Elliott on Highways, p. 316, and cases cited.)

An interference with the right of the public to free passage constitutes a public nuisance, which no length of time will legalize. (Elliott on Highways, p. 475 and cases.)

Right to use land of adjoining owners.—If a highway be impassable or foundering, or even dangerous to be traveled over, or incommodious from being out of repair, or from other causes, the public have a right to a new way for the time being, and for this purpose may go on the adjoining land, but a traveler must go on it as near the highway and use it as little as possible. If the land is inclosed the traveler may remove the fences. If the land is under cultivation, the traveler may nevertheless use it, doing no unnecessary injury. This privilege does not extend to persons traveling private roads. (Williams v. Safford, 7 Barb. 309; Taylor v. Whitehead, Doug. 745; Bullard v. Harrison, 4 M. and S. 387; White v. Wiley, 36 St. Rep. 102.)

Use of the road.—In the use of the road the public is subject to the reasonable regulations of the municipal authorities having jurisdiction of the highway. If, in the use of extraordinary or unusual vehicles the highway is injured, the persons using them are liable to the town for the damages sustained. The law requires that the highway shall only be used for the purposes which may be presumed to have been contemplated when the highway was laid out. Where the injury to the highway is only such as results from ordinary wear there is no liability on the part of the traveler.

Travelers in vehicles or riding horses or other animals.—Persons traveling on a highway with carriages, or riding horses or other animals are required on meeting persons traveling in the opposite direction to seasonably turn to the right of the center of the road, so as to permit passage without interference or interruption, under a penalty of five dollars for every neglect or offense, to be recovered by the party injured, in addition to any actual injury he may have sustained. (H. L., § 157).

The statute includes persons in stage coaches, wagons, carts, sleighs, sleds, automobiles or motor vehicles, b*is* *trie-*

cles and every other carriage or vehicle used for the transportation of persons or goods, or either of them. (H. L., § 162). Presumptively, a liability is incurred by a person who refuses to obey the statute to the injury of another who is free from contributory negligence. (*Pike v. Bosworth*, 7 N. Y. State Rep. 665).

It is not the center of the smooth or most traveled part of the road that is the dividing line, but the center of the worked part, although the whole of the smooth or most traveled part is upon one side of that center. (*Earing v. Lansingh*, 7 Wend. 185). It is no defense that the party had no design to offend; that he attempted to prevent collision; that the road on his side is rough and rutty; or more difficult for him to turn out than the other party. (*Id.*) Unless the obstacles to turning out are insuperable or extremely difficult he is without excuse. In winter, however, the center of the road is the center of the beaten or traveled track, without reference to the worked part. (*Smith v. Dygert*, 12 Barb. 613; *Jaquith v. Richardson*, 8 Met. 213).

The law of the road is not inflexible and it has been held that a light vehicle ought to give way to a wagon heavily loaded, but the loaded wagon should stop if due care requires it. (*Wayde v. Carr*, 2 Dow & Ry. 255; see *Elliott on Highways*, p. 619.)

One who drives on the wrong side, assumes the risk, and must use greater care than if he had kept on the right side. (*Brooks v. Hart*, 17 N. H. 307; *Elliott on Highways*, 620; *Cooley on Torts*, p. 666). If a collision takes place the presumption is generally against the party on the wrong side. (*Burdick v. Worrall*, 4 Barb. 596; *Brooks v. Hart*, 14 N. H. 307.) Especially is this true in the dark. (*Cruden v. Pentham*, 2 Esp. 685.) But the fact that one is on the wrong side does not excuse the exercise of ordinary care on the part of the person on the right side. (*Parker v. Adams*, 12 Met. 415; *Hoffman v. Union Ferry Company*, 68 N. Y. 385; *Lane v. Atlantic Works*, 107 Mass. 104; *Quinn v. O'Keefe*, 9 App. Div. 68.) Persons lawfully using a public street owe to each other the duty of exercising ordinary care, and each is justified, in the absence of anything to the contrary, in assuming that the other will so act. (*Baker v. Fehr*, 97 Pa. St. 70.)

"Seasonably turn," means that the travelers shall turn to the right in such season that neither shall be retarded in his progress by the other occupying his half of the way, when he may have occasion to use it in passing. (*Brooks v. Hart*, 14 N. H.

310; *Spooner v. Brooklyn, etc., R. R. Co.*, 54 N. Y. 230.) Of course this rule does not apply to street cars, which travel on a track and can not turn to the right or left. (*Hegan v. Eighth Ave. R. R. Co.*, 15 N. Y. 380; *Whitaker v. Eighth Ave. R. R. Co.*, 51 N. Y. 295.) Nor does it apply to a vehicle meeting a street car. (*Id.*) The vehicle may turn to either the right or left. (*Id.*)

If two persons are traveling in the same direction, and the hindmost traveler, in attempting to pass the other, carelessly or negligently collides with him and injures him, or, if he recklessly drives his horse so as to run into the other's carriage and injures it, an action for damages may be brought by the party injured, if he himself was free from fault and could not have avoided the collision by the use of ordinary care. (*Center v. Tuney*, 17 Barb. 94.)

One may drive along a street railroad, yet, as the car has the exclusive right to any part of the track, he is bound to turn off, so as not to unnecessarily delay the car, and he must listen for whatever signal may be made from the car and must not wait for the signal, but should look behind him from time to time, so as not to make the car slacken speed. (*Adolph v. Central Park, etc., R. R. Co.*, 76 N. Y. 530.)

This law of the road, however, is subject to some exceptions. An ambulance is given the right of way and other drivers should heed the warning bell of the ambulance driver and give him free passage. The driver may assume that his warning will be heeded, and that other vehicles will give him the road. (*Byrne v. Knickerbocker Ice Co.*, 4 N. Y. Supp. 531.) So in the case of fire engines, mail wagons and police patrol wagons, the public emergency or the necessity of haste is such that the vehicle is entitled to the right of way, free from the impediment of other vehicles.

Travelers on foot.—The law of the road does not affect persons on foot passing on the sidewalks. (*Grant v. City of Brooklyn*, 41 Barb. 381.) Nor does it apply to a carriage meeting a person on foot. *Savage v. Gernster* 36 App. Div. 220. All persons have a right to walk in a highway or street and whether they are or are not on the crosswalk, are entitled to the exercise of reasonable care on the part of persons driving along it, while they, themselves, are bound to exercise the same reasonable care. (*Boss v. Lilton*, 5 Car. and Payne, 407.) A person driving horses along the streets is bound to anticipate that travelers on foot may be at crossings and must take reasonable care not to injure them. (*Murphy v. Orr*, 96 N. Y. 14.) While a

foot passenger has no priority of right in the street or highway, he has the right to cross where he pleases, if he does so with due caution. (*Moebus v. Herrmann*, 13 N. Y. St. Rep. 648; 108 N. Y. 349; *Murphy v. Orr*, 96 N. Y. 14.) Vehicles and foot passengers have equal rights in the street or highway and both should exercise the care and caution that the circumstances demand.

The driver of a street car is subject to the same obligations in this respect, as the driver of any other vehicle. (*Hyland v. Yonkers*, etc., R. R. Co., 15 N. Y. St. Rep. 824.)

Right to stop.—Travelers, whether on foot or in carriages, have a right to stop a reasonable time by the roadside for their own convenience, provided they do not unduly interfere with the rights of others. Thus hacks or omnibusses may stop to unload passengers. A traveler on foot may stop to tie his shoe or get a drink at a hydrant or fountain without losing his rights as a traveler. But this right must not interfere with the rights of others. Thus, it is unlawful for coaches to congregate in a crowded street and remain standing for an unreasonable length of time. (*Illidge v. Goodwin*, 5 Car and Payne, 190.) And it has been held that where a man hitched his wagon so that the wheels extended into the beaten track, he was guilty of contributory negligence, and could not recover damages for an accident occasioned by a collision. (*Murray v. McShane*, 52 Md. 217; *Duffy v. Dubuque*, 63 Ia. 171.)

Right to drive cattle in highway.—It is lawful to drive cattle in a highway, but due care must be used, depending on the location and nature of the highway. If reasonable care is used in driving cattle along a highway, and, notwithstanding such care, they escape and go upon adjoining land which is unfenced, the owner of the cattle is not liable where he uses reasonable care and promptness in removing them. (See *Elliott on Highways*, p. 633.)

Depasturing highways.—At common law the public had no right to depasture a highway, since the freehold and all its profits belong to the owner of the soil. A different rule was formerly adopted in this state, but the code of civil procedure now prohibits cattle, horses, colts, asses, mules, swine, sheep or goats from running at large or being herded or pastured in the highways, and prescribes penalties for the violation of such prohibition. (Code Civ. Pro. § 3082ff.)

§ 158. Intemperate drivers not to be engaged.—No person owning any carriage for the conveyance of passengers, running

or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage, who is addicted to drunkenness, or to the excessive use of spirituous liquor; and if any such owner shall violate the provisions of this section, he shall forfeit at the rate of five dollars per day, for all the time during which he shall have kept any such driver in his employment.

§ 159. Drivers, when to be discharged.—If any driver, while actually employed in driving any such carriage, shall be guilty of intoxication, to such a degree as to endanger the safety of the passengers in the carriage, the owner of such carriage shall, on receiving written notice of the fact, signed by any one of said passengers, and certified by him on oath, forthwith discharge such driver from his employment; and every such owner, who shall retain, or have in his service within six months after the receipt of such notice, any driver who shall have been so intoxicated, shall forfeit at the rate of five dollars per day, for all the time during which he shall keep any such driver in his employment after receiving such notice.

§ 160. Leaving horses without being tied.—No driver of any carriage used for the purpose of conveying passengers for hire, shall leave the horses attached thereto, while passengers remain in the same, without first making such horses fast with a sufficient halter, rope or chain, or by placing the lines in the hands of some other person, so as to prevent their running; and if any such driver shall offend against the provisions of this section, he shall forfeit the sum of twenty dollars.

Running horses on highway, a misdemeanor.—A person driving any vehicle upon any plank road, turnpike or public highway,

who unjustifiably runs the horses drawing the same, or causes, or permits, them to run, is guilty of a misdemeanor. (Penal Code, § 666, as amended by L. 1904, chap. 539.)

§ 161. Owners of certain carriages liable for acts of drivers.—The owners of every carriage running or traveling upon any turnpike road or highway, for the conveyance of passengers, shall be liable jointly and severally, to the party injured, for all injuries and damages done by any person in the employment of such owners, as a driver, while driving such carriage, whether the accident occasioning such injury or damage be willful or negligent, or otherwise, in the same manner as such driver would be liable.

Not applicable to street cars.—The conductor or motorman of a street car is not a driver within the meaning of this section. Isaacs v. Third Ave. R. R. Co., 47 N. Y. 122; Whitaker v. Eighth Ave. R. R. Co., 51 N. Y. 295.

§ 162. Term "carriage" defined.—The term "carriage" as used in this article, shall be construed to include stage coaches, wagons, carts, sleighs, sleds, automobiles or motor vehicles, and every other carriage or vehicle used for the transportation of persons and goods, or either of them, and bicycles, tricycles, and all other vehicles propelled by manumotive or pedomotive power, or by electricity, steam, gasoline, or other source of energy. (Amended by L. 1901, chap. 531, in effect April 25, 1901.)

§ 163. Entitled to free use of highways.—The commissioners, trustees, or other authorities having charge or control of any highway, public street, park, parkway, driveway or place, shall have no power or authority to pass, enforce or maintain any ordinance, rule or regulation, by which any person using a bicycle or tricycle shall be excluded or prohibited from the free use of any highway, public street, avenue, roadway, driveway, park,

parkway or place, at any time when the same is open to the free use of persons having and using other pleasure carriages, except upon such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages. But nothing herein shall prevent the passage, enforcement or maintenance of any regulation, ordinance or rule, regulating the use of bicycles or tricycles in highways, public streets, driveways, parks, parkways and places, or the regulation of the speed of carriages, vehicles, or engines, in public parks and upon parkways and driveways in the city of New York, under the exclusive jurisdiction and control of the department of parks of said city nor prevent any such commissioners, trustees, or other authorities in any other city from regulating the speed of any vehicles herein described in such manner as to limit and determine the proper rate of speed with which such vehicles may be propelled, nor in such manner as to require, direct or prohibit the use of bells, lamps and other appurtenances nor to prohibit the use of any vehicle upon that part of the highway, street, park, or parkway, commonly known as the footpath or sidewalk. (As amended by L. 1901, chap. 531; L. 1903, chap. 625 and L. 1904, chap. 540, in effect May 3, 1904.)

§ 164. Penalties, how recovered.—All penalties or forfeitures given in this chapter, and not otherwise specially provided for, shall be recovered by the commissioners of highways, in the name of the town in which the offense shall be committed; and when recovered, shall be applied by them in improving the highways and bridges in such town.

§ 165. Stone and rubbish not to be dumped in highways.—No stone or other rubbish shall be drawn to and deposited within the limits of any highway, except for the purpose of filling in a depression or otherwise improving the highway, with the con-

sent of the commissioner of highways and under the direction of a commissioner or overseer of highways. (Added by L 1898, chap 352.)

§ 166–169b. Use of highways by automobiles.—Sections added by L. 1901, chap. 531 and repealed by Motor Vehicle Law (L. 1904, chap. 540.) See p. — for this act.

RIGHTS OF ABUTTING OWNERS.

Title of contiguous owner to highway.—The owner or occupant of land contiguous to a street or highway has two distinct rights in relation to the street or highway, one which he enjoys with all citizens in common and one which arises from his ownership or occupancy of contiguous property. If he is owner of the fee of the highway, his title to the land covered by the highway is absolute and exclusive, subject only to the public easement for which the highway was acquired.

Rights in general.—The owner of the fee is entitled to the mines, quarries, springs, trees, herbage, earth, the right to drain, to mine, and to employ the soil for any purpose not inconsistent with the public right of way. He may divert a spring and use the water for his own purpose. He may carry water in pipes under the highway. (Dygert v. Schenck, 23 Wend. 446; Matter of Petition of Rhinelander, 68 N. Y. 105; Beck v. Carter, 68 N. Y. 283.) If trees are cut by the highway authorities in laying out the highway, he is entitled to the timber, except so far as it may be used by the highway officers in front of his premises. (H. L., § 156.) The fruits or nuts of trees planted along a highway, or on branches which extend from his land over the highway, belong to him. If the fruit or nuts fall to the ground, they belong to the owner in fee, but if they are destroyed in consequence of the use of the highway for proper highway purposes, the owner of the fee is not entitled to damages. For the infringement of any of his rights he has all the ordinary remedies of the owner of the freehold. (Jackson v. Hathway, 15 John., 447; Gas Light Co. v. Calkins, 62 N. Y., 386.) He may maintain an action against one who unlawfully cuts and carries away the grass, trees and herbage, and even against one who stands on the sidewalk in front of his premises and uses abusive language toward him, refusing to depart; for such a use of the land constitutes a trespass as much as an entry on his inclosed premises. (Adams

v. Rivers, 11 Barb, 390; Carpenter v. Owego R. R. Co., 24 N. Y., 655; Gidney v. Earl, 12 Wend, 98; Willoughby v. Jencks, 20 Wend., 96.) The land is his, subject only to the rights of the public to use it for highway purposes. He may sell it without subjecting himself to any liability (Whitbeck v. Cook, 15 John., 486; Washington Cemetery v. R. R. Co., 68 N. Y. 591) and if the highway is abandoned or discontinued, the land reverts to the original owner or his heirs or assigns.

Presumption in relation to the fee.—The presumption is that the owners of land adjoining a highway are owners of the fee, if owning the land on but one side, to the center, or if owning the land on both sides, including the entire width of the highway. (Bissell v. New York Central Railroad, 23 N. Y., 61; Wager v. Troy Railroad, 25 N. Y., 529.) The presumption, however, is one which may be rebutted, for one man may own the fee of the adjoining land and another the fee of the land covered by the highway. As a general rule, a conveyance which describes land as bounded along, upon, or to a highway, infers that the middle of the street was intended (Child v. Star, 4 Hill, 369; Hammond v. McLachlan, 1 Sandf., 323), while, if the boundary is described as by the side, running along the margin, or by the line of a highway, the fee to the highway is probably not conveyed. (Jones v. Cowman, 2 Sandf., 234; Augustine v. Britt, 15 Hun, 395.)

Fee in municipality.—Where the fee of the land covered by the highway is in the municipality, the abutting owner is entitled to light, air and free access to his premises, but apart from these he has no greater right to the highway in front of his premises than any other citizen, and this for the very simple reason that the title to the land is in another.

Carrying on business in highway.—The right of the public to an uninterrupted passage in a highway being paramount to the owner's rights in the soil, it will be unlawful for him to carry on any part of his business therein to the annoyance of the public. A temporary occupation by persons engaged in building, or in receiving or delivering goods from stores or warehouses, taking up or setting down passengers from a coach or omnibus, or the like, is allowed from the necessity of the case; but a systematic and continued encroachment is not allowable. (People v. Cunningham, 1 Denio, 524; Callahan v. Gilman, 107 N. Y., 360.) As to building materials necessarily placed in the street, the consent of the local authorities is usually required. The necessity of such occupation need not be absolute, excluding the possibility of performing the labor in a dif-

ferent way, but must be reasonable under the circumstances. For instance, a wagon loaded with fuel may doubtless stand in front of a private dwelling for a sufficient time to unload, if reasonable and convenient, although there may be a temporary obstruction of the highway, and the fuel might be conveyed to the house in a different manner. It seems that one doing business in a populous city has the right to temporarily obstruct the sidewalk in front of his place of business, for the purpose of loading merchandise, but he should not unnecessarily incumber the sidewalk, or continue the obstruction for an unreasonable length of time. This right has, however, been questioned. (*Richardson v. Barstow* [Sup. Ct., Sp. T.], 36 N. Y. State Rep'r, 983.) This subject is discussed more at length under the subject of encroachments and obstructions, §§ 104, 105, ante.

ARTICLE VII.

Regulation of Ferries.

Section 170. Licenses.

- 171. Undertaking.
- 172. Appendages for rope ferries.
- 173. Superintendent of public works may lease right of passage.
- 174. When schedules to be posted.

§ 170. **Licenses.**—The county court in each of the counties of this state, or the city court of a city, may grant licenses for keeping ferries in their respective counties and cities, to such persons as the court may deem proper, for a term not exceeding five years. No license shall be granted to a person, other than the owner of the land through which that part of the highway adjoining to the ferry shall run, unless the owner is not a suitable person or shall neglect to apply after being served with eight days written notice from such other person of the time and place at which he will apply for such license, or having obtained such license, shall neglect to comply with the conditions of the license, or maintain the ferry. Every license shall be entered in the book of minutes of the court by the clerk; and a certified copy thereof shall be delivered to the person licensed. When the waters over which any ferry may be used, shall divide two counties or cities, or a county and city, a license

obtained in either of the counties or cities shall be sufficient to authorize transportation of persons, goods, wares and merchandise, to and from either side of such waters.

Cross references.—Regulation of ferries by boards of supervisors. See County L., § 78, post. Maintenance of a ferry without authority is a misdemeanor. (Penal Code, § 415.)

Notice must be given to owner of land adjoining ferry. Matter of Taleott, 31 Hun, 464.

§ 171. Undertaking.—Every person applying for such license shall, before the same is granted, execute and file with the clerk of the court his undertaking, with one or more sureties, approved by the court, to the effect that he will attend such ferry with sufficient and safe boats and other implements, and so many men to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct.

§ 172. Appendages for rope ferries.—Any person licensed to keep a ferry may, with the written consent of the commissioners of highways of the town where such ferry may be, erect and maintain within the limits of the highway, at such point as shall be designated in such consent, a post or posts, with all necessary braces and appendages, for a rope ferry.

§ 173. Superintendent of public works may lease right of passage.—The superintendent of public works where ferries are now maintained at tide water, lease the right of passage for foot passengers across state lands adjoining tide water for a period not exceeding ten years, on such conditions as he may deem advantageous to the state.

§ 174. When schedules to be posted.—Every person licensed to operate or control any ferry in this state, or between this state and any other state, operating from or to a cit-

thousand inhabitants or over, shall post in a conspicuous and accessible position outside and adjacent to each entrance to such ferry, and in at least four accessible places, in plain view of the passengers upon each of the boats used on such ferry, a schedule plainly printed in the English language of the rates of ferriage charged thereon, and authorized by law to be charged for ferriage over such ferry. If any such person shall fail to comply with the provisions of this section, or shall post a false schedule, he shall be guilty of a misdemeanor. (Amended by L. 1900, chap. 313.)

Neglect to post schedules.—A person, corporation or association operating any ferry in this state or between this state and any other state, operating from or to a city of 500,000 inhabitants or over, posting a false schedule of ferry rates, or neglecting to post in a conspicuous and accessible place in each of its ferry houses, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry, is guilty of a misdemeanor. Penal Code, § 415a.

L. 1902, chap. 396, in effect April 7, 1902, renumbered the former article 8, making it article 9, and §§ 180 to 183, both inclusive, making them §§ 200 to 203, both inclusive; and adds a new article as follows:

ARTICLE VIII.

County Supervision of Highways.

Section 180. Adoption of article.

- 181. County engineer; deputy.
- 182. Other duties of county engineer.
- 183. Contracts for the construction of highways.
- 184. Construction and repair of bridges.
- 185. Examination of bridges by county engineer.
- 186. Issue of town bonds for the erection of bridges.
- 187. Reports of commissioners of highways.
- 188. Report of county engineer.
- 189. Adoption of resolution to return to former system.

§ 180. Adoption of article.—The board of supervisors of any county may, by resolution duly passed at an annual or special meeting thereof, adopt the provisions of this article. No part

hereof shall be in force or effect in any county, unless such resolution is adopted. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 181. County engineer; deputy.—There may be a county engineer in every such county who shall be appointed by the board of supervisors thereof in the manner provided by section fifty-five of the highway law; and all the provisions of such section, and of any other act relating to the office of county engineer, shall apply to the county engineer appointed hereunder. The board of supervisors may in its discretion appoint a deputy who shall assist such county engineer in the performance of his duties. The county engineer shall give his entire time and attention to the construction and improvement of highways and bridges in the county, for such portion of the year as the local conditions shall permit of operations, which period shall be fixed by the board of supervisors at the time the appointment is made, and the salary fixed by such board shall be regulated according to the period of time during which such engineer and his deputy will be so employed. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 182. Duties of county engineer.—The county engineer shall personally examine the various formations and deposits of gravel and stone in his county, for the purpose of ascertaining the materials which are best available for the improvement of the highways therein. He shall obtain from the state engineer and surveyor copies of the specifications and rules and regulations prescribed by him for the improvement and maintenance of highways under statutes provided therefor. The county engineer and the commissioners of highways shall comply with such rules and regulations in all cases where they are suited to local conditions, and to the amount of money which is available in the several towns for highway purposes. The county en-

gineer shall, when called upon by the commissioner of highways of any town in the county, visit and examine such highways as the commissioner may indicate as needing improvement. After such examination the county engineer shall, in consultation with the commissioner of such town, establish grades and give such lines and indicate such means of drainage and methods of improvement as seem to him best suited to the local conditions and the funds available for such improvement. He shall visit the highways which are being improved or constructed, and give such further directions and establish such further lines and grades as are needed for the successful completion of the work. The county engineer shall supervise and direct the maintenance of all highways which have been constructed and improved by state aid, pursuant to the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, in accordance with directions which shall be given for such maintenance by the state engineer and surveyor, and such rules and regulations as may be prescribed therefor. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 183. Contracts for the construction of highways.—The town board in any town of such county which has adopted the money system, upon the recommendation of the county engineer, may provide that the construction of new highways, or the permanent improvement or reconstruction of existing highways shall be done under contracts. All such contracts shall be awarded in accordance with plans and specifications to be furnished by the county engineer to the lowest responsible bidders, after advertisement once a week for three consecutive weeks in a newspaper published in the town where the work is to be performed or, if no newspaper is published therein, in a newspaper published at some other place in the county nearest to such town.

All bids for such work shall be opened in public and shall be filed in the office of the town clerk. No such contract shall be awarded, unless it be approved by the county engineer as to its form and sufficiency. The person to whom such contract is awarded shall execute a bond to the town in a sum equal to the amount of the contract, with two or more sureties to be approved by the town board, conditioned for the faithful compliance with the terms of the contract and the plans and specifications, and for a payment of all damages which may accrue to the town because of a violation thereof. When such work is completed pursuant to the terms of such contract and the plans and specifications therefor, and accepted by the county engineer and town board as being in accordance therewith, the cost of the work under the contract shall be paid in the same manner as other town charges. No money shall be paid under such contract, unless a certificate has been issued to the contractor by the county engineer to the effect that the work has been done under and in accordance with the terms of such contract and the plans and specifications. All work under any such contract shall be under the supervision of the county engineer or some person designated by him. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 184. Construction and repair of bridges.—The work of repairing, improving or erecting bridges in such county shall be done under the general supervision of the county engineer, pursuant to plans prepared by him. The town board may, on the recommendation of the county engineer, provide for the performance of such work by contract, awarded as prescribed in the preceding section. The provisions of the preceding section relating to contracts and payments thereunder shall apply to contracts awarded under this section. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 185. Examination of bridges by county engineer.—The county engineer shall examine all bridges in his county having a span of more than twenty feet, at least once in each year and shall report the condition thereof and make such suggestions and recommendations in respect thereto as he may deem necessary, to the town board, if such bridge is wholly maintained by a town, and if not, to the board of supervisors of his county. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 186. Issue of town bonds for the erection of bridges.—No town in any such county shall issue bonds for the erection or re-construction of a bridge for more than one thousand dollars, unless a proposition therefor has been submitted and adopted as provided by law, at a biennial or special town meeting duly called therefor, and in no event shall the board of supervisors or town board authorize the issue of bonds unless such a proposition has been adopted. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 187. Reports of commissioners of highways.—The commissioner of highways in each town in any such county shall on or before the first day of November in each year, or at such other times as the board of supervisors of such county may direct, make a written report to the county engineer stating the condition of the highways and bridges in his town and the amount expended thereon under contracts or otherwise during the preceding year, and such other facts in relation to such highways and bridges as may be required by the county engineer. The form of such report shall be prescribed by the county engineer. A copy of such report shall be filed in the office of the town clerk. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 188. Report of county engineer.—The county engineer shall report to the board of supervisors at its annual session:

1. The condition of the highways in the several towns of his county.
2. The amount expended by the several towns under contracts for the construction and improvement of highways.
3. The amount raised in each town for general highway purposes, and generally the manner in which the amount so raised has been expended.
4. The condition of the bridges in the several towns of his county, and the amount expended thereon under contracts approved by him.
5. Suggestions and recommendations as to methods of highway construction and repairs, which will best promote the permanent improvement and better condition of the highways in his county.
6. Such other matters in connection with the highways and bridges of his county as may seem to him of importance.

The board of supervisors may require a further report of other information concerning the highways and bridges of such county. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

§ 189. Adoption of resolution to return to former system.—
At any time after the expiration of five years from the passage of a resolution adopting the provisions of this article, a resolution may be passed by such board of supervisors at its annual meeting to return to the former system of controlling and regulating the affairs of the towns of such county, relating to highways and bridges. Upon the adoption of such resolution the office of county engineer shall be abolished, and the provisions of the highway law and all other statutes relating to highways and bridges shall be applicable to the highways and bridges of such county as if the board of supervisors thereof had not adopted the provisions of this article. (Added by L. 1902, chap. 396, in effect April 7, 1902.)

ARTICLE IX.**Repealing and Other Laws.**

(Renumbered by L. 1902, chap. 396.)

- Section 200. **Laws repealed.**
201. **Saving clause.**
202. **Construction.**
203. **When to take effect.**
Schedule.

§ 200. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed. (Renumbered by L. 1902, chap. 396.)

§ 201. **Saving clause.**—The repeal of a law, or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued, or acquired, or penalty, forfeiture, or punishment incurred prior to the time when this act takes effect, under or by virtue of the laws so repealed, but the same may be asserted, enforced, prosecuted, or inflicted, as fully and to the same extent as if such laws had not been repealed; and all actions or proceedings, civil or criminal, commenced under or by virtue of the laws so repealed and pending February twenty-eighth, eighteen hundred and ninety-one, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law. (Renumbered by L. 1902, chap. 396.)

§ 202. **Construction.**—The provisions of this chapter, so far as they are substantially the same as those laws existing on February twenty-eighth, eighteen hundred and ninety-one, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter,

and not as new enactments; and references in laws not repealed to provisions of law incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this chapter shall be construed to amend or repeal any provision of the Penal or Criminal Code. (Renumbered by L. 1902, chap. 396.)

§ 203. When to take effect.—This chapter shall take effect on the first day of March, eighteen hundred and ninety-one. (Renumbered by L. 1902, chap. 396.)

SCHEDULE OF LAWS REPEALED.

Revised Statutes.. Part I, chapter 16 All.

Revised Statutes.. Part I, chapter 20, title 13, All.

Laws of	Chapter.	Sections.
1832.....	107.....	All.
1833.....	149.....	All.
1832.....	274.....	All.
1834.....	267.....	All.
1835.....	154.....	All.
1836.....	122.....	All.
1837.....	431.....	All.
1840.....	300.....	All.
1841.....	225.....	All.
1845.....	180.....	5, 6, 7, 9, 12, 13, 14.
1847.....	455.....	3, 4, 5, 6, 7, 8, 9, 11, 12, 20, 21, 22, 23.
1853.....	63.....	All.
1853.....	135.....	All.
1853.....	174.....	All.
1855.....	255.....	All.
1857.....	383.....	All.
1857.....	491.....	All.
1857.....	615.....	1.
1857.....	639.....	All.
1858.....	51.....	All.
1858.....	103.....	All.
1860.....	61.....	All.
1860.....	468.....	All.

Laws of	Chapter.	Sections.
1861.....	30.....	All.
1861.....	311.....	All.
1862.....	243.....	All.
1863.....	93.....	All.
1863.....	444.....	All.
1864.....	395.....	All.
1865.....	442.....	All.
1865.....	522.....	7.
1866.....	180.....	All.
1866.....	770.....	All.
1868.....	791.....	All.
1868.....	843.....	All.
1869.....	24.....	All.
1869.....	131.....	1.
1869.....	593.....	All.
1870.....	461.....	All.
1872.....	274.....	1.
1873.....	63.....	All.
1873.....	69.....	All.
1873.....	395.....	All.
1873.....	448.....	All.
1873.....	477.....	All.
1873.....	773.....	All.
1874.....	169.....	All.
1874.....	570.....	All.
1875.....	22.....	All.
1875.....	196.....	All.
1875.....	341.....	All.
1876.....	340.....	All.
1876.....	348.....	All.
1877.....	197.....	All.
1877.....	344.....	All.
1878.....	44.....	All.
1878.....	49.....	All.
1878.....	114.....	All.
1878.....	245.....	All.
1879.....	67.....	All.
1880.....	114.....	All.
1880.....	305.....	All.
1880.....	308.....	All.
1880.....	503.....	All.
1881.....	233.....	All.
1881.....	513.....	All.

Laws of	Chapter.	Sections.
1881.....	696.....	All.
1881.....	700.....	All.
1883.....	346.....	All.
1883.....	371.....	All.
1883.....	398.....	All.
1884.....	220.....	All.
1884.....	251.....	All.
1884.....	359.....	All.
1884.....	396.....	All.
1884.....	479.....	All.
1886.....	269.....	All.
1886.....	344.....	All.
1886.....	422.....	All.
1886.....	452.....	All.
1887.....	471.....	All.
1887.....	526.....	All.
1887.....	704.....	All.
1888.....	240.....	All.
1888.....	260.....	All.
1889.....	120.....	All.
1889.....	146.....	All.
1889.....	259.....	All.

CHAPTER III.

Duties of Boards of Supervisors Relating to Highways and Bridges.

(County Law. (L. 1892, chap. 686.) Article IV.)

Section 60. Limitation of article.

61. County highways and bridges.
62. Location and construction of bridges.
63. County aid to towns for the construction and repair of bridge.
64. Construction by county of destroyed bridges.
65. Apportionment of expenses, when a bridge is intersected by town or county lines.
66. County's share of expenses, to be raised and paid to commissioners of highways of towns.
67. May authorize a town to construct a bridge outside of a boundary line.
68. Bridges over county lines.
69. Authorizing towns to borrow money.
- 69a. Authorize towns to purchase toll roads or toll bridges.
70. The raising and expenditures of moneys.
71. Streets outside of city limits.
72. Survey and records of highways.
73. Regulation of toll-rates.
74. Highways in counties of more than 300,000 acres of unimproved land.
75. Appropriation of certain non-resident highway taxes.
76. Balance of state appropriations.
77. Alteration of state roads.
78. Further powers.
79. Powers as to tires on vehicles.
80. Use of abandoned turnpike, plank or macadamized roads.
81. Definition of "upon its borders."

§ 60. **Limitation of article.**—This article [Article IV. of the County Law] shall not apply to bridges on the Hudson river below Waterford, or on the East river, or over the waters forming a part of the boundaries of the state.

The constitution, Art. III., § 18, provides that no local law shall be passed providing for the construction of bridges except on the Hudson river below Waterford.

§ 61. **County highways and bridges.**—A board of supervisors shall, on the application of twenty-five resident tax-payers, when satisfied that it is for the interest of the county, lay out, open, alter, or discontinue a county highway therein, or cause the same to be done, and construct, repair, or abandon a county

bridge therein, or cause the same to be done, when the board shall deem the authority conferred on commissioners of highways insufficient for that purpose, or that the interest of the county will be promoted thereby. All expenses so incurred shall be a county charge. Such powers shall not be exercised unless the applicants therefor shall prove to the board the service of a written notice, personally or by mail, on a commissioner of highways of each town in the county, at least twelve days prior to the presentation of such application, specifying therein the object thereof; and when the application is to lay out a highway, or construct a bridge, the route or location thereof; and in all other cases, a designation of the highway or bridge to be affected thereby.

Application. This section authorizes a board of supervisors to lay out and construct a county highway or county bridge upon the application of twenty-five resident tax-payers of the county; and also to alter, or discontinue a county highway which has already been laid out or repair or abandon a county bridge which has already been constructed. This power may be exercised independent of the adoption of the county-road system as provided in §§ 54-59a of the Highway Law, ante, p. 124. But where it is intended to engage generally in the construction and maintenance of county highways, it will probably be deemed advisable either to proceed under such sections of the Highway Law, or adopt the provisions of Article VIII. of such law, (ante, p. 244) relating to county supervision. Counties are now, for the most part, constructing highways with the aid of the state, under the State Aid Act, L. 1898, chap. 115, post., and it probably will seldom, if ever, be "for the best interest of the county," to lay out or open a highway under the above section. But when a road in a county has been constructed by the county it may be discontinued or altered in the manner provided in the above section.

At common law the duty of repairing bridges rested upon the county, where no private person or other body was specially charged with that duty. But the rule at common law was never adopted in this state. The general system which always existed here has made the towns primari-

maintenance of highways and bridges. Hill v. Board of Supervisors, 12 N. Y. 52; People ex rel. Root v. Board of Supervisors, 146 N. Y. 107; People ex rel. Keene v. Board of Supervisors, 142 N. Y. 271.

Negligence of a board of supervisors in maintaining highways and bridges cannot be made the basis of an action against a county for injuries received from defects therein. Ahern v. County of Kings, 89 Hun, 148; Godfrey v. County of Queens, 89 Hun, 18.

The application, notice, proof of service of notice, and order and resolution of the board of supervisors may be as follows:

FORM NO. 106.

Application.

To the Board of Supervisors of the County of

We, the undersigned, being twenty-five resident taxpayers of the county of, hereby make application, in pursuance of section 61 of the County Law, for the laying out (opening, alteration or discontinuance) of a county highway of the width of (or the construction, repair or discontinuance of a bridge), described as follows:

(Insert a definite description of the proposed highway, or the location of the proposed bridge.)

Dated this day of, 19....

A. B.,
C. D., &c.

FORM NO. 107.

Notice of Application.

To the Highway Commissioners of the several towns in the County of

Notice is hereby given that on the day of, 19.... the foregoing application will be presented to the board of supervisors of the county of

Dated this day of, 19....

A. B.,
C. D., &c.

FORM NO. 108.

Proof of Service.

STATE OF NEW YORK. } ss.
County of

C. C., being duly sworn, says that he is a resident of, N. Y., and that he served the application and notice annexed hereto personally, on each of the following commissioners of highways at the times and places set opposite their names, respectively:

B. C. at, N. Y., May 9, 19..., at o'clock, in the noon.

C. D. at, N. Y., May 10, 19..., at o'clock, in the noon, by delivering to and leaving with each of them true copies thereof; and he further says that he knew the persons so served to be the commissioners of highways of the town of

(Signed) C. C.

Subscribed and sworn to before me,
this day of, 19.... }
G. H.,
Notary Public.

FORM NO. 100.

Resolution of Board Laying out Highway.

Resolution providing for the laying out (alteration or discontinuance) of a highway (or construction of a bridge) in the town of between (describe location of highway or bridge) pursuant to Section 61 of the County Law.

At a meeting of the board of supervisors of the county of, held at, on the day of, 19....

Whereas, application has been made for the laying out (altering or discontinuing), of a highway (or the construction, repair or discontinuance of a bridge) in said county; and whereas satisfactory proof has been made to us of the service of a copy of such application, together with a notice of intention to make the same, upon a commissioner of highways of each town in said county; and that it seems to us that there is a necessity for the laying out (alteration or discontinuance) of such highway (or the construction, repair or discontinuance of such bridge);

Resolved, That a highway of the width of be laid out in accordance with such application, the center of which is to commence at, and run thence (insert survey).

(Or, That a bridge be constructed over (state location), to be of the following description (state kind of bridge), the cost thereof not to exceed the sum of \$.....)

R. S., Chairman.

C. D., Clerk.

Adopted.

Ayes

Noes

§ 62. Location and construction of bridges.—The board may authorize the location, change of location and construction of any bridge, applied for by any town, or towns, jointly, or by other than a municipal corporation, created under a general law, or by any corporation or individual for private purposes; and if a public bridge, erected other than by a municipal corporation, establish the rates of toll for crossing such bridge; but if such bridge is to cross a navigable stream, provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw, to prevent any obstruction of the navigation of such stream; and if a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. When such bridge shall be intersected by the line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction herein

permitted. But this section shall not apply to a pier bridge erected or to be erected over the Mohawk river above the state dam by a corporation organized under the transportation corporations law, provided such corporation shall comply with all the provisions of said transportation corporations law applicable thereto; such a corporation, without further proceeding, shall have the right to erect and maintain piers in said river for the purposes of such a bridge. (Amended by L. 1898, chap. 225).

As to joint liability of town and county to pay expenses of construction and maintenance of bridges over boundary line of county, see Highway Law, § 130, and notes thereunder, ante.

Power of board as to location not exclusive.—The above section does not deprive the commissioners of highways of a town of the power to erect a new bridge when necessary to connect the two portions of a highway intersected by an intersecting stream. The power conferred upon the board is not exclusive and does not prevent the construction of a bridge at a point selected by the town board of a town, after power has been conferred upon the town by the board of supervisors to borrow money therefor. *Huggams v. Riley*, 125 N. Y. 88. In this case Judge Gray said: "Where, in the general interests of the county, action may be required with reference to the public roads and bridges, the legislature has conferred a power to act upon its board of supervisors; but when the interests of the public of a town demand that its highways be made passable, the commissioner of highways has as much the implied power to effect that result by constructing a new bridge, as he has the express power of doing so by repairing an old, or replacing a destroyed bridge. The only ground for the claim of an exclusive right in the board of supervisors to act in the matter of location is statutory. There is no claim upon the county, as in the case of an application to the board to cause the moneys to be raised by the county. The town has voted for a bridge in a certain locality and has assumed and provided for the expense of its erection. For the court to hold that because the precise location had not been made and would not be made by the county supervisors, no bridge can be constructed at all would, in my opinion, be a view of the statutory regulations on that subject which is quite unwarrantable. I do not think the legislature meant any such thing, and its acts are not suscepti-

ble of a construction which lodges such exclusive power in the county board of supervisors."

Rates of toll may be regulated by boards of supervisors, see County Law, § 73, post, p. 280, and Transportation Corporations Law, § 136, post.

A person owning lands on both sides of a river may without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. Such owner cannot, however, without legislative authority, maintain a bridge or ferry for public use. *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; and see *People ex rel. Howell v. Jessup*, 160 N. Y. 249.

Railroad bridge across navigable stream.—Where, in an action brought against a railroad company to recover damages for obstructing a navigable stream, it appears that one of the defendant's bridges closed up a common water highway, and that the plaintiff has sustained damages from the obstruction, his case is established, and it rests upon the defendant to show its authority to construct the bridge, and that it was properly built and managed. *Doxsey v. Long Island R. R. Co.*, 35 Hun, 362.

The power of the board may be executed by it in any manner that satisfies its sound discretion. No particular set of agents is required by the statute. The practice of doing it through the agency of commissioners is a very general one, and approved by usage of long standing. *People v. Meach*, 14 Abb. N. S. 429.

§ 63. County aid to towns for the construction and repair of bridges.—If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money, not exceeding two thousand dollars in any one year, to be raised by the county and paid to such town to aid in defraying such expenses.

Construction and maintenance of bridges over boundary line of county at joint expense of county and town, see Highway Law, §§ 130-133.

Object and application.—Ordinarily the highways and bridges lying wholly within a town are to be constructed and maintained at the sole expense of the town, on early date, under

the common law of England, the duty or repairing bridges devolved upon the county, they being regarded as for the common good and convenience of the residents of the entire county. In this state as early as 1784, chap. 52 (1 General Laws, 105), the construction and maintenance of bridges was committed to town officers. It seems to have very soon become apparent to the legislature that requiring the towns to bear the entire expense of constructing its bridges imposed in some instances an undue burden, and as early as 1801 an act was passed giving to the boards of supervisors the power of assisting a town when it was made to appear that the town was unreasonably burdened by the erection or repair of its bridges. *People ex rel. Root v. Supervisors*, 81 Hun, 216, aff'd 146 N. Y. 107. See also *Hill v. Supervisors*, 12 N. Y. 52; *People v. Supervisors of Dutchess*, 1 Hill, 50.

§ 64. Construction by county of destroyed bridges.—If any bridge within a county, or intersected by any boundary line of a county, shall be destroyed by the elements, and the board of supervisors of the county shall deem that the expenses of the construction of a new bridge at or near the site of the bridge so destroyed would be too burdensome upon the town or towns within such county, which would otherwise be liable therefor, the board of supervisors of any such county may provide for the construction and completion of a bridge and all necessary approaches thereto, at or near the site of the bridge so destroyed. If the bridge so destroyed shall have been constructed by a corporation created under a general law, and the site thereof, and of the approaches thereto, or either, shall be the property of such corporation, such board of supervisors may purchase the interest of such corporation, or any other person, in such site or approaches, if such purchase can be accomplished upon reasonable terms; but if such site or approaches can not be lawfully acquired by such purchase, or otherwise, upon reasonable terms, such board may acquire title to premises on either side of such site, and provide for the construction of a bridge and approaches thereto, at such place, at

the expense of the county, or of the two counties jointly, as the case may be, provided such bridge shall be so located as not to increase the distance to be traveled upon the highway to reach each end of such bridge more than five rods. Any board of supervisors providing for the construction of any such bridge may determine by resolution whether the expenses of the maintenance and repair thereof shall thereafter be a county charge, or a charge upon such town or towns.

A county is absolutely liable for at least one-sixth the cost of the construction and maintenance of bridges lawfully constructed over the boundary line of the county. Highway Law, § 130, ante, p. This duty of the county to contribute may be enforced by mandamus. *People ex rel. Keene v. Supervisors, 142 N. Y. 271.*

Where a bridge is destroyed by the elements, the board of supervisors may provide for its reconstruction without regard to the limit of \$2,000 fixed by the preceding section.

Acquisition of toll bridges.—Under L. 1899, ch. 594, a board of supervisors may acquire the rights and franchises of a toll bridge company and purchase any bridge for the use of which a toll is exacted. The above section is for the purpose of enabling the county to reconstruct a toll bridge which has been destroyed, and for such purpose the board may acquire the site of the bridge destroyed by purchase or condemnation.

§ 65. Apportionment of expenses when a bridge is intersected by town or county lines.—If any public free bridge, intersected by the boundary line of a county, shall also be intersected by the boundary line of two or more towns in such county, the board of supervisors of such county shall apportion as it shall deem equitable, between such towns, their respective shares of the expenses of the construction, maintenance and repair of such bridge, and the amount to be received by each town, or the money raised by the county to be paid toward defraying the expenses of constructing and repairing such bridge.

Bridges over county boundary lines are to be constructed and maintained at the joint expense of town and county, the county

being liable for at least one-sixth of the cost of such construction and maintenance, see Highway Law, § 130, ante, p. Where such bridges are also intersected by the boundary lines of towns, the board of supervisors is required to apportion between such towns, the balance of the cost remaining after the county has taken care of its share.

The apportionment may be made by the board of supervisors upon its own motion. *People ex rel. Morrill v. Supervisors, 112 N. Y. 585.* In case the board of supervisors fails or refuses to make such apportionment the old rule apportioning the cost of construction and maintenance among the adjoining towns, as established by L. 1841, chap 225 and L. 1857, chap. 383, and re-enacted in Highway Law, §§ 134-137, ante, still continues in force. *Surdam v. Fuller, 31 Hun, 500.*

§ 66. County's share of expenses to be raised and paid to the commissioners of highways of the towns.—The board of supervisors shall cause to be raised and collected the amount to be paid by the county to any town toward the expenses of a bridge and when collected the same shall be paid to the commissioners of highways of the town, to be applied by them toward the payment of such expenses.

Levy of tax to pay the amount chargeable to the county is to be made as provided in Highway Law, § 133, ante, and the sum raised is to be paid to the commissioners of highways as directed in the above section. Commissioners of highways are required to deliver to the supervisor of the town, annually, a verified statement of the amount expended, or indebtedness incurred in the construction and maintenance of free bridges in his town during the preceding year. Highway Law, § 132, ante.

§ 67. May authorize a town to construct a bridge outside of a boundary line.—The board of supervisors of any county may authorize any town, on a vote of a majority of the electors thereof voting at a regular town meeting, to appropriate a sum, or pledge its credit, to aid in, or wholly construct and maintain a bridge outside the boundaries of the town or county, or from

or within the boundary line of any town into another town or county, but forming a continuation of highways leading from such town or county, and deemed necessary for the public convenience.

§ 68. **Bridges over county lines.**—The board shall provide for the care, maintenance, preservation and repair of any draw or other bridge intersecting the boundary line of counties or towns, and which bridge is by law a joint charge on such counties or towns, or on the towns in which it is situated; and to severally apportion, as it may deem equitable, the expenses thereof on the towns respectively liable therefor, or on the respective counties when liable; but when such bridge shall span any portion of the navigable tide-waters of this state, forming, at the point of crossing, the boundary line between two counties, such expense shall be a joint and equal charge upon the two counties in which the bridge is situated, and the board of supervisors in each of such counties shall apportion such expense among the several towns and cities in their respective counties, or upon any or either of such towns and cities, as in their judgment may seem proper; and if there be in either of said counties, a city, the boundaries of which are the same as the boundaries of the county, then it shall be the duty of the common council of such city, to perform the duty hereby imposed upon the boards of supervisors; but no town or city not immediately adjacent to such waters, at the points spanned by said bridge shall be liable for a larger proportion of such expense than the taxable property of such town or city bears to the whole amount of taxable property of such county. The board of supervisors of such counties or in any city embracing the entire county, and having no board of supervisors, the common council shall have full control of such bridges. No such bridge shall be constructed unless the board of supervisors in each of such counties, and the comm

of the city whose boundaries are the same as the boundary of the other county adjacent to such waters, shall first by resolution determine that such bridge is necessary for public convenience, in which case such common council, with the consent of the mayor, may authorize the issue of bonds for the purpose of constructing such bridge, to be issued as other bonds are issued in said city. Whenever any bridge now spanning any such navigable tidewaters or hereafter erected across any such navigable tidewaters, shall be condemned by the United States authorities as an obstruction to navigation, and shall be ordered removed, the county and city authorities having charge of such bridge, if they shall determine that such bridge shall be rebuilt, shall, as soon as practicable after such determination, cause plans to be prepared for the erection of the new bridge and the removal of any bridge so condemned as aforesaid, and within a reasonable time after the approval of any such plans by the United States authorities, the proper officers shall proceed with the construction of said new bridge. In case of any unreasonable delay on the part of the officer or officers charged with the duty of construction of such new bridge, such duty may be enforced by mandamus upon the application of any citizen interested in its performance. (Amended by L. 1896, chap. 995.)

See also Highway Law, §§ 130-133, ante.

Liability of a county to construct a bridge over a dividing stream only exists where there is a lawful highway which would be connected by and which becomes a part of such highway. *People ex rel. Keene v. Supervisors*, 151 N. Y. 190; *Beckwith v. Whalen*, 70 N. Y. 430.

Mandamus will lie to compel boards of supervisors of two counties divided by navigable tide-waters spanned by a bridge on a highway crossing such waters, to keep such bridge in repair. *People ex rel. Keene v. Supervisors*, 142 N. Y. 271. And when the reparation requires that the bridge shall be rebuilt, it is the duty of the two boards to rebuild it. *Idem.*

Discretion of board.—It is for the board to determine the character of the bridge to be built; limited only by the requirement that it meets the public need. The court cannot control the board's discretion in determining the particular form and manner in which the board shall execute the duty imposed upon it so long as it acts in good faith. *People ex rel. Keene v. Supervisors*, 142 N. Y. 271.

Defective bridges; liability of county.—Whether the maintenance of highways and bridges is devolved as a duty upon the towns or upon the counties of the state, it must be regarded as a duty, in its nature public and governmental; and this is especially so in respect to the duty imposed by the above section upon the counties, of maintaining bridges which span navigable waters of the state, forming a boundary line between two counties. *Markey v. County of Queens*, 154 N. Y. 675. In this case the court said: "A public bridge is a public highway. Its maintenance is quite as much a governmental duty towards the public within the territory of the state, and the principle that the state holds its highways in trust for the public is applicable. This is especially true where a bridge is necessary to cross the navigable waters of the state; but it is true under all circumstances. * * * To charge the duty of building and maintaining a bridge over navigable waters upon boards of supervisors of counties was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit, and in its exercise they acted as agents for the public at large. The state, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway and its performance might properly be delegated to the officers of the particular civil division. The corporate body of the county derived no special advantage from it in its corporate capacity and, if that be true, it should not be liable for the negligent acts of the boards of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be exempt from a private action as would be the state itself."

§ 69. Authorizing towns to borrow money.—The board may upon the application of any town, liable or to be made liable to taxation, in whole or in part, for constructing, building, repairing or discontinuing any highway or bridge therein, or upon its borders, pursuant to a vote of a majority of the electors of such town at an annual town meeting or special town meeting, called

for that purpose, taken pursuant to sections thirty, thirty-one and thirty-two of the town law; or upon the written request of the commissioners of highways and town board of such town or towns, and said vote of a majority of said electors, in a case arising under section ten of the highway law, where the highway or bridge has not been already repaired or rebuilt, authorize such town or towns to construct, build, repair or discontinue such highway or bridge and to authorize said town or towns to borrow such sums of money therefor, for and on the credit of such town or towns as may be necessary according to a written estimate in items of the fair cost and expense thereof. Said board may also on the application of any town or towns, authorize them to borrow such sums of money, for or on the credit of such town or towns, as may be necessary to pay any debt lawfully incurred by or on behalf of such town or towns. In a case arising under section ten of the highway law, where the highway or bridge has been actually built or repaired, the application shall be accompanied by the certificate and audit provided by sections eleven and twelve of the highway law. In all other cases the application shall be accompanied by the certificate of the town board of the subject, occasion and amount of the indebtedness, and, as far as practicable, with the items, vouchers and audits thereof. If such highway or bridge shall be situate in two or more towns in the same county, the board shall apportion the expense among such towns in such proportion as shall be just. If said town or towns contain any portion of the lands of the forest preserve, said board shall not authorize said town or towns to borrow any such moneys without the written approval of the forest, fish and game commission, except to pay a debt of the town incurred in good faith pursuant to section ten of the highway law. (Amended by L. 1894, chaps. 79, 163; L. 1895, chap. 742; L. 1896, chap. 178; L. 1900, chap. 12 and L. 1903, chap. 469.)

Incurring indebtedness for highways and bridges.—Independent of authority conferred by statute, towns have no authority to borrow money for municipal purposes or for the payment of town charges. Town charges must be met by the levy of taxes upon the taxable property of the town in the manner provided by law. In the case of *Wells v. Town of Salina*, 119 N. Y. 280, 290, which is a leading case in this question, the court said: "It is the policy of the laws that town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges or are the taxpayers when they arise, must bear the burden of taxation to meet them. It is quite easy for the taxpayers of to-day to create a debt which they are not to feel and which the taxpayers of the future are to discharge. The system of laws relating to towns requires that all bills for moneys expended or materials furnished, or services rendered to the town shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the board of supervisors against the taxpayers of the town. The whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid whether the town had had the benefit thereof or not, and the wise provisions of the statutes to secure economy and safety by the audit of accounts would be entirely frustrated."

If the moneys ordinarily raised by tax for highways and bridges are not sufficient for the proper maintenance thereof, or if it is proposed to improve the highways and bridges by their re-construction or alteration, the commissioners may cause a proposition to be submitted at a town meeting for the raising of an additional sum by tax. Highway Law § 9, ante. And if the highways and bridges of a town are in unsafe condition and need immediate repair, the town board may authorize the commissioners to incur indebtedness for such repairs, and the amount thereof must be audited and paid by the town in the same manner as other town charges. Highway Law, §§ 10, 11, ante. But neither of these sections authorize a town to borrow money and issue bonds therefor, for the purpose of paying the indebtedness incurred.

Power to authorize issue of bonds by town. Boards of supervisors have the general power to authorize a town to borrow money for town uses and purposes on its credit, and issue its obligations therefor, when and in the manner authorized by law. County Law, § 12, subd. 6. But if the necessity exists

to borrow money for the construction or repair of highways and bridges, proceedings must be taken as provided in the above section.

A board may authorize a town to borrow money for the construction or repair of highways and bridges either when the town by a vote of a majority of its electors at a town meeting duly called and held so directs, or upon the written request of the commissioners of highways and town board, where such highways and bridges have already been constructed or repaired under the authority of section 10 of the Highway Law. See *Barker v. Town of Oswegatchie*, 16 N. Y. Supp. 727, 41 N. Y. St. Rep. 821; *May v. Bermel*, 20 App. Div. 53. The amendment of 1903 limits the authority of the board to authorize the issue of bonds upon the request of the commissioners and town board and requires in addition thereto the "vote of a majority of said electors, in a case arising under section 10 of the Highway Law, where the highway or bridge has not been already repaired or rebuilt."

The above section does not affect the power of a town to raise money by immediate taxation by a vote at an open town meeting, for the improvement of its roads and bridges. *Birge v. Berlin Iron Bridge Co.*, 133 N. Y., 477.

Submission of proposition to town electors.—The application may be made pursuant to a vote of the majority of the electors of a town at a biennial or special town meeting. A written application for the submission of the proposition at a town meeting signed by at least twenty-five taxpayers upon the last town assessment roll must be filed with the town clerk at least twenty days before the town meeting at which the proposition is to be submitted, plainly stating the question they desire to have voted upon, and requesting a vote thereon at such town meeting. Town Law, § 32. It has been held that such statute is not complied with, where it appears that a sufficient number of persons signed a paper, denominated a "resolution," which recited that a certain sum should be raised on the faith and credit of the town, by an issue and sale of its bonds, and that the money raised and its interest should be charged upon the property of the town taxable therefor, for the purpose of grading and paving certain roads,—the paper not being addressed to the town clerk, and not stating any question which the signers desired should be voted upon, or requesting that any vote be taken thereon at a town meeting, and the signers, though taxpayers, not being described as such. *Town of Oyster Bay v. Harris*, 21 App. Div. 227.

The town clerk is required to give at least ten days' notice, posted conspicuously in at least four of the most public places in the town, of any such proposed question, and that a vote will be taken by ballot at the town meeting mentioned. Town Law, § 32.

If such proposition is to be submitted at a special town meeting, a written application signed by at least 25 of the taxpayers upon the last town assessment roll must be addressed to the town clerk and filed in his office. Town Law, § 23. No previous notice need be given of a biennial town meeting, but the town clerk shall, at least ten days before the holding of a special town meeting, cause notice thereof under his hand and seal, to be posted conspicuously in at least four of the most public places in the town; which notices shall specify the time, place and purposes of the meeting. Town Law, § 24.

A proposition submitted at a town meeting requesting authority of the board of supervisors to borrow money for the construction of a bridge or the improvement of a highway if incurring a liability exceeding \$500, must be voted upon by ballot. Berlin Iron Bridge Co. v. Wagner, 57 Hun 348; and if it is proposed to issue new bonds in place of those which have matured, if the amount exceeds the sum of \$500, the proposition must be voted upon by ballot. People ex rel. Read v. Town Auditors, 85 Hun 114; Town Law, § 31.

An elector of a town shall not be entitled to vote by ballot upon any proposition providing for the incurring of a town liability for the construction and improvement of highways and bridges unless he, or his wife, is the owner of property in the town, assessed upon the last preceding assessment roll thereof. Town Law, § 31. A woman who possesses the qualifications to vote for town officers, except the qualification of sex, and who is the owner of property in the town assessed upon the last preceding assessment roll thereof, is entitled to vote upon a proposition to raise money by tax or assessment. Town Law, § 44, as added by L. 1901, chap. 509.

Appointment of commissioners to superintend work.—A resolution cannot be submitted to the electors of a town at a special town meeting called for the purpose of providing for the raising of money for the construction and maintenance of a bridge, for the appointment of commissioners to superintend the construction of such bridge. The statute only authorizes a vote upon the question of issuing bonds for the raising of money for the construction and maintenance of a bridge. If it is desired to provide for the appointment of commissioners

superintend the construction of the bridge, it is possible that an application may be made to the board of supervisors for the passage of an act therefor, under the provisions of the above section of the County Law. In case the board of supervisors has authority to act in a given case, it is presumed that they will be authorized to appoint commissioners to superintend the construction of the bridge. Berlin Iron Bridge Co. v. Wagner, 57 Hun 346.

Resolution of board of supervisors.—An act or resolution providing for the contracting of a funded debt by a town and the issue of bonds therefor, should provide for raising annually by tax a sum sufficient to pay the interest and the principal, when such sum shall become due. General Municipal Law, § 5. The resolution should also require adequate security from the officers charged with the duty of executing the bonds. Barker v. Town of Oswegatchie, 10 N. Y. Supp. 834.

Limitation of indebtedness.—A town cannot be authorized to issue town bonds for any purpose when such issue, with the amounts issued and outstanding under any previous or other authority of the board of supervisors, shall exceed ten per centum of the assessed valuation of the real estate of such town, as it shall appear on the last assessment rolls thereof, unless by the assent of a majority of the electors of such town, whose credit is proposed to be given, voting on the question at a regular town meeting of such town; but in no case shall the amount of such town obligations issued and outstanding, exceed one-third of such assessed valuation. County Law, § 13.

The forms of applications to the board of supervisors for authority to borrow money and issue bonds, and the resolution of the board authorizing such issue may be as follows:

FORM NO. 110.

Application to Borrow Money for Construction or Repair of Bridge or Highway.

To the Board of Supervisors of the County of

A proposition having been duly submitted at a special (or biennial) town meeting held in the town of on the day of 19.... pursuant to the provisions of §§ 30, 31 and 32 of the Town Law, providing for the construction (rebuilding, repair or discontinuance) of a highway in such town, as hereinafter described, (or for construction, rebuilding or repair of certain bridges in such town), and for the borrowing of the sum of dollars and the issue of town bonds therefor for the purposes aforesaid, and such proposition having been adopted by a majority of the electors of such town voting at such town meeting, as will appear from the proceedings of such town meeting as to such proposition duly certified by the town clerk, annexed to this petition and made a part hereto;

Therefore, pursuant to the authority conferred upon us by section 69 of the County Law, we, the undersigned, members of the town board and highway commissioners of the town of, State of New York do respectfully petition your honorable board for authority to construct (rebuild, repair or discontinue) a highway in such town described as follows:

(Insert a detailed description of the highway to be constructed, repaired or discontinued; if more than one highway is to be constructed, rebuilt, repaired or discontinued, describe each of them; if authority is desired to construct, rebuild or repair one or more bridges give the location of each.)

We do further respectfully petition that your honorable board authorize the said town of to borrow the sum of dollars, and to issue its bonds therefor, under such terms, conditions and restrictions as your said board may legally impose, which sum is to be expended for the construction (rebuilding, repair or discontinuance) of such highway, (or construction, rebuilding or repair of such bridges).

The fair cost and expense of the construction (rebuilding, repair or discontinuance) of the highway (or bridges)proposed to be constructed (rebuilt, etc.) is estimated as follows:

(Insert in items the estimated cost of the proposed improvement, or if bridges are to be constructed, rebuilt or repaired, the estimated cost of each bridge and all matters pertaining thereto.)

Signed, (By each member of the town board and by each highway commissioner.)

Dated this day of 19....

Certificate of Town Clerk.

STATE OF NEW YORK.
 County of } ss.:
 Town of

I, town clerk of the town of, county of, State of New York, do hereby certify that at a special town meeting (or biennial town meeting) held in the town of, at, in the village of, in said town on the day of, 19...., the following proposition was duly submitted thereat to the electors of such town:

(Insert proposition submitted verbatim):

That there were 360 votes cast for and against such proposition. Upon a canvass of the votes so cast the following result appeared and was duly declared and entered:

Votes for such proposition..... 310.

Votes against such proposition..... 50.

In witness whereof I have hereunto set my hand and affixed the seal of said town of, at such town, this day of, 19....

Signed, (By town clerk with seal
of town affixed, if any.)

FORM NO. 111.

Application for Authority to Issue Bonds where Indebtedness has been Incurred.

To the Board of Supervisors of the County of

At a meeting of the town board and commissioner of highways of the town of, on the day of, 19...., each member of the town board and each commissioner being present, the following resolution was duly presented and unanimously adopted:

Whereas, In pursuance of and by authority of section 10 of the Highway Law of the State of New York, the commissioner of highways of the town of has become obligated for the payment of the sum of dollars, over and above the amount provided by the town estimates and highway taxes of said town, for the year 19.... and said expenditures and obligations being caused solely by the destruction and damage by the elements of the following highways and bridges in said town, during the year 19...., making such highways and bridges unsafe:

(Describe in detail the highways and bridges so destroyed and damaged by the elements), and

Whereas, Each and every item of said work of constructing, repairing and rebuilding such highways and bridges for which said commissioner of highways has become obligated to pay, the total amount of which exceeds the sum of \$500, was done under a written contract therefore, which contract was duly approved by the town board of the town of; and

Whereas, All of the said expenditures and obligations of the said commissioners of highways of the said town of have been duly consented to by the town board of the said town of as will appear in the copies of such consents which are annexed hereto, (to petition annex copies of consents of town board for the incurring of indebtedness, as provided in § 10 of the Highway Law; see form No. ... ante); and,

Whereas, Such expenditures and obligations are, in the opinion of this town board of said town, and each and every one of them, necessary and proper, and yet unusual and not to be foreseen; therefore be it

Resolved, That application be made to the board of supervisors of the town of to secure authority from such board for the issue of bonds of the said town of for the sum of dollars; and that said bonds be made payable at the Bank, in the City of State of New York, as follows:

(Specify the amount of each bond and the time when each shall be payable.)

In pursuance of such resolution and the authority conferred by section 69 of the County Law, we, the undersigned, members of the town board of the town of do hereby respectfully petition your honorable board to authorize the said town of to issue its bonds for the sum of dollars for the purpose of meeting the indebtedness incurred in the manner described in the above resolution.

Dated this day of 19....

Signed. (By each member of the town board.)

FORM NO. 112.

Resolution Authorizing Construction of Bridges and Highways and Issue of Bonds Therefor.

An Act authorizing the town of in the county of State of New York, to construct (state whether a bridge or highway is to be constructed, rebuilt or repaired), and to borrow money and issue its bonds therefor for the purpose of paying the cost of such construction (rebuilding or repair). Passed on the day of 19.... two-thirds of all the supervisors elected to the board of supervisors of such county voting in favor thereof.

The Board of Supervisors of the County of in pursuance of authority conferred by section 69 of the County Law, and

the acts amendatory thereof, and in pursuance of the provisions of sections 12 and 14 of the County Law and of sections 5, 6, 7, 8 and 9 of the General Municipal Law, do enact as follows:

Whereas, the town board and commissioners of highways of the town of have made application to this board for authority to construct (repair, rebuild or discontinue) a highway, (or for the construction, repair or rebuilding of a bridge), which highway (or bridge) is located as follows: (Give location of bridge or highway) and also have applied for authority to borrow the sum of dollars upon the credit of said town, and to issue the obligations of said town therefor, and

Whereas, It appears that the said highways, (or bridges) were destroyed (or damaged) by the elements to such an extent as to become unsafe for public use, and that the estimated cost and expense of such construction (repair, or rebuilding) exceeds the sum of \$500, and that such construction (rebuilding or repair) is necessary and proper, and that such town should be authorized to borrow the sum of dollars upon the credit of such town and issue its bonds therefor, now therefore be it

Resolved, That the town of in the County of State of New York, be and is hereby authorized to construct (rebuild or repair) the said highway (or bridge) and that the said town is hereby authorized and empowered to issue its bonds upon the credit of such town to an amount not to exceed the sum of dollars, and to sell or cause the same to be sold at not less than their par value to the highest bidder at a rate not exceeding five per cent. per annum for the purpose of paying the cost and expenses of the construction (repair or rebuilding) of such highway (or bridge); and

Resolved, That such bonds shall be signed by the supervisor and the town clerk of the said town of, and that the supervisor of such town shall negotiate such bonds according to law and as above provided, and that he shall apply the proceeds of the sale thereof to the payment of the cost and expense of such construction, (repair or rebuilding). That the said supervisor before issuing or negotiating any of said bonds shall make and execute to the town clerk of such town in behalf of and for the benefit of such town, a good and sufficient bond or obligation in the penal sum of dollars, conditioned for the faithful performance of his duties in issuing such bonds, and the lawful application of the funds which may be realized by the sale thereof, and of the funds that may be raised by tax or otherwise for the payment of the bonds issued in pursuance of this act, and the interest thereon, which may come into his hands. Such bond or obligation so made by the said supervisor, shall be approved by the town board of such town and filed in the office of the town clerk; and be it further

Resolved, That such bonds shall be made payable at the Bank in the City of, and that the interest on such bonds shall be payable at such bank, semi-annually on July 1st and January 1st of each year. That one thousand dollars of the principal sum of such bonds shall be made payable on the first day of January in the year 19...., and one thousand dollars thereof shall be made payable on the first day of January of each and every year thereafter up to and including the first day of January in the year 19....; be it further

Resolved, That before any of the bonds authorized by this act shall be issued, the supervisor of the town of, shall advertise for sealed proposals for the amounts or part thereof, of said bonds so authorized to be issued, but in amounts not less than five hundred dollars each, such advertisement to be published for two consecutive weeks prior to such issue, in two newspapers published in the State of

New York, at least one of which shall be published in the county of; and be it further

Resolved, That the form of such bonds shall be as follows:

No. \$1,000.

Bond of the town of County of and State of New York, for constructing (repairing or rebuilding) roads and bridges in said town.

Know all men by these presents, that the town of county of and state of New York, is held and firmly bound unto in the sum of one thousand dollars to be paid to the said his or their certain representatives, successors or assigns, on the 1st day of 19.... for which payment well and truly to be made the said town of binds itself firmly by these presents.

Dated this day of 19....

The condition of this obligation is such that if the above bounden town of shall well and truly pay or cause to be paid to the above named his or their certain representatives, successors or assigns, the sum of one thousand dollars and annual interest upon all sums unpaid thereon to be paid on the 1st day of as the same shall occur, at the rate of four per cent from the date of the last payment thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

All payments of principal and interest to be made at the Bank in the City of State of New York.

This bond is issued in pursuance of sections 14 and 69 of the County Law, of the provisions of the General Municipal Law, and a resolution of the board of supervisors of county, passed

In witness whereof, the said town has caused these presents to be signed and sealed by the supervisor and town clerk of said town.

..... Supervisor of town of

..... Town Clerk of town of

(Town Seal.)

There shall be attached to each of said bonds the proper number of interest coupons made payable in accordance with this act, and each of such interest coupons shall be signed by the said supervisor and the said town clerk; be it further

Resolved, That the board of supervisors of the said county of shall assess and levy upon the taxable property of the said town of a sufficient sum to pay the principal and interest of said bonds from year to year as the same shall mature, and the supervisor of said town of shall report the amount of said principal and interest to the said board of supervisors as required by law.

Certificate of Chairman and Clerk of Board.

STATE OF NEW YORK. } ss.:
County of

We, the undersigned, chairman and clerk of the board of supervisors of the County of for the year 19.... do hereby certify that the foregoing is a true copy of an act passed by the state board, by a two-thirds vote of all the members elected thereto, on the day of 19....

Signed, (By Chairman and Clerk of Board.)

§ 69a. Authorize towns to purchase toll roads or toll bridges.—The board may authorize a town or towns to purchase for public

use, any plank road, turnpike, toll road or toll bridge in such town, and may authorize the company owning the same, to sell the same, or any part thereof, or the franchise thereof, and to authorize such town or towns to borrow such sums of money as may be necessary therefor for or on the credit of such towns, after the same shall have been directed by a vote of a majority of the electors at a town meeting, or special town meeting as provided in section sixty-nine. [County Law, (L. 1892, chap. 686), § 69a, as inserted by L. 1903, chap. 469.]

The rights and franchises of plank road, turnpike or bridge companies may be acquired by the board of supervisors in behalf of the county, and county bonds may be issued in payment thereof. The bonds so issued may be apportioned by the board upon the towns, cities and villages in which such plank road, turnpike or bridge is located in such proportions as the board may seem just. L. 1899, chap. 594, post. The above section is for the purpose of enabling a town or towns to purchase any such plank road, turnpike or toll bridge.

§ 70. The raising and expenditure of moneys.—The board shall, from time to time, impose upon the taxable property of such towns sufficient tax to pay such obligations as they shall become due. The supervisor and town clerk shall each keep a record, showing the date and amount of the obligations issued, the time and place of their payment, and the rate of interest thereon. The obligations shall be delivered to the supervisor of the town, who shall dispose of the same for not less than par, and pay the proceeds thereof to the commissioners of highways of the town, or to such other officer as shall be designated by the board of supervisors, to be used by them for the purposes for which the same were appropriated; but not more than five hundred dollars of such proceeds shall be expended upon any highway or bridge, except in pursuance of a contract made by a contractor with the commissioners of highways of the town, or other officer designated by the board of supervisors, and

approved by the town board, no member of which shall be interested therein. If such highway or bridge shall be wholly or partly within the limits of an incorporated village, the consent of a majority of the trustees of such village shall be necessary for the action of the board of supervisors as herein provided.

Issue of bonds.—The statute does not prescribe the term for which bonds may be issued. Long term bonds are permissible. It has been held that bonds issued to run for thirty years with legal interest, and payable in gold are valid. *Ghiglione v. Marsh*, 23 App. Div. 61. It was also held in this case that the supervisors may direct that the interest on the bonds, sold at a premium, be paid out of the proceeds of the sale until the tax provided to pay the same can be collected.

Conditions imposed by board of supervisors.—In legislating for a town under the provisions of the above section and section 69, the board of supervisors may impose conditions as to details for the interest of the taxpayers, not specified in the statute, such as safe-guards to the letting of contracts, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer to be paid out only upon the certificate of the engineer; and such conditions, so imposed, are binding upon the commissioners of highways. *People ex rel. Wakeley v. McIntyre*, 154 N. Y. 628.

§ 71. Streets outside of city limits.—When any territory in a county containing an incorporated city of one hundred thousand inhabitants, excepting the towns of Flatbush and New Lots in the county of Kings, has been mapped into streets and avenues pursuant to law, the board of supervisors may authorize the establishment of a plan for the grade of such streets and avenues, laying out, opening, grading, constructing, closing and change of line of any one or more of them, and provide for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, and for the levy, collection and payment of the amount of damages sustained, and the charges and expenses incurred, or which may be necessary to incur in carrying out such provisions, but such last named

power in regard to laying out, opening, grading, constructing and change of line, of such streets or avenues or defraying the expenses thereof, shall only be exercised on the petition of the property owners, who own more than one-half of the frontage on any such street or avenue, or on a certificate of the town board and commissioners of highways of the town, that the same is, in their judgment, proper and necessary for the public interest. If the streets and avenues, in respect to which such action is proposed to be taken, shall lie in two or more towns, a like certificate shall be required of the town board and commissioners of highways of each town. Before making such certificate, such town board, or boards and commissioners of highways, shall give ten days' notice by publication in one of the daily papers of the county, and by conspicuously posting in six public places in each of such towns, of the time and place at which they will meet to consider the same, at which meeting the public, and all persons interested, may appear and be heard in relation thereto. No such street or avenue shall be laid out; opened or constructed, upon or across any lands acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by a corporation formed for the purpose of improving the breed of horses, without the consent of such corporations. No town officer shall charge anything for his services under this section, nor shall any charge be made against any such town or the property therein, for the expense of the publication of the notice herein required.

The above section was derived from L. 1875, chap. 482, § 1, sub. 9. This subdivision was amended by L. 1892, chap. 289. The amendatory act being passed at the same session of the legislature as the County Law, it is still in force, notwithstanding the repeal of the act amended thereby, and may be held to supersede the above section of the County Law, (see Statutory Construction Law, § 31.)

We have, therefore, inserted such amendment in this place:

L. 1875, ch. 482.—"An act to confer on boards of supervisors further powers of local legislation and administration, and to regulate the compensation of supervisors."

Streets and avenues in territory adjoining city. § 1, subd. 9.
—To authorize in any county containing an incorporated city of one hundred thousand inhabitants or upward, when any territory within such county and beyond the limits of such city has been mapped out into streets and avenues in pursuance of law; the establishment of a plan for the grades of such streets and avenues; the alteration of such plan of grades, or of any plan thereof which shall have been established by law; the laying out, opening, grading, construction, closing and change of line, or of the width of any or more of such streets and avenues, or any part or parts thereof, and of the court-yards, sidewalks and roadways; to provide for the estimation and award of the damages to be sustained, and for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, the levying, collection and payment of the amount of such damages, and of all other charges and expenses to be incurred, or which may be necessary in carrying out the provisions of this subdivision; the laying down of new or additional streets and avenues upon the established map or plan thereof, the acceptance by town officers of conveyances of land for public highways, the naming and changing of names of the streets and avenues laid down on said map or plan, and the numbering and renumbering of houses and building lots fronting on said streets and avenues; but such last-named powers in regard to the alteration of said map or plan, the laying down, laying out, opening, grading, construction, closing and change of line of such streets or avenues, or the naming or numbering as aforesaid, or such provisions for defraying the expense thereof, shall only be exercised on the petition of the property owners who own more than one-half of the frontage of any such street or avenue, or on the certificate of the supervisor, justices of the peace, and commissioners of highways of the town, or two-thirds of such officers, that the same is in their judgment proper and necessary for the public interest; or in case the said streets or avenues in respect to which such action is proposed to be taken, shall lie in two or more towns, on a like certificate of such town officers of each of said towns, or two-thirds of all of them; provided, however, that before proceeding to make any such certificate, the said officers or such number of them as aforesaid, shall give ten days' notice by publication in one of the daily

papers of said county and by posting in six public places in such town, or in each of such towns, of the time and place at which they will meet for the purpose of considering the same, at which meeting the public and all persons interested, may appear and be heard in relation thereto; and provided that no such street or avenue shall be laid out, opened or constructed upon or across any lands heretofore acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by any existing corporation formed for the purpose of improving the breed of horses, without the consent of such corporation. The provisions of this section shall not apply to the town of Flatbush in the county of Kings. (Amended by L. 1881, chap. 554, and L. 1892, chap. 289.)

Power of boards of supervisors over streets.—Boards of supervisors under the above section are vested with legislative discretion to lay out and construct certain streets and avenues, and to provide by limited or general assessments for the payment of damages awarded for property taken for such purpose. Control over the whole subject, legislative discretion as to all incidents and details, and the mode of accomplishing the purpose, is in the broadest and most general way conferred upon the supervisors. *Hubbard v. Sadler*, 104 N. Y. 223.

§ 72. Survey and records of highways.—The board may authorize and direct the commissioners of highways of any town to cause a survey to be made, at the expense of the town, of any or all of the highways therein, and to make or complete a systematic record thereof, or to revise, collate and rearrange existing records of highways, and correct and verify the same by new surveys and to establish the location of highways by suitable monuments. Such records so made, or revised, corrected and verified, shall be deposited with the town clerk of the town, and shall thereafter be the lawful records of the highways which they describe; but shall not affect rights pending in any judicial proceeding commenced before the deposit of such revised records with the town clerk.

Description of highways.—Highway commissioners are required to cause such highways as shall have been laid out, but

not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office. Highway Law, § 4, sub 2, ante, p. 25.

Survey of highways laid out by commissioners.—Whenever commissioners of highways shall lay out any highway, either upon application to them or otherwise, they shall cause a survey thereof to be made, and shall incorporate the survey in an order to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same. Hiwhway Law, § 81, ante, p. 155.

Where monuments are erected establishing the location of highways, it is the duty of overseers of highways to cause them to be kept up and renewed, so that the extent of the highways may be publicly known. Highway Law, § 20, sub. 6, ante, p. 75.

§ 73. Regulation of toll rates.—Such boards shall have power, by a vote of two-thirds of all the members elected, to authorize an alteration, reduction or change of the rates of toll charged or received by any turnpike, plank or gravel road, or other toll road within such county, or by any bridge company or ferry within such county, or, if within more than one county, then by joint action with the supervisors of such counties, provided such alteration shall be asked for by the directors, trustees or owners of such road, bridge or ferry; but that no increase of toll shall be so authorized unless notice of intention to apply for such increase shall have been published in each of the newspapers published in such county, once in each week for six successive weeks next before the annual election of supervisors in such county; and any alteration in rates of toll authorized by any board of supervisors may be changed or modified by any subsequent board, on their own motion, by a like vote of two-thirds of all the members elected to such board; but nothing herein contained shall affect or abridge the powers of any city.

Regulation of tolls.—The toll to be charged by a turnpike or plank road corporation is regulated by statute. But the toll to

be charged by a bridge corporation is to be prescribed by the board of supervisors under the above section. See Transportation Corporations Law, § 130. The rates of ferriage must be posted as provided in Highway Law, § 174, ante.

§ 74. Highways in counties of more than 300,000 acres of unimproved land.—The board may establish separate highway districts in counties containing more than three hundred thousand acres of unimproved unoccupied forest lands, for the purpose of constructing highways through such lands; such highway districts to be established upon the application of the owners of more than one-half of the non-resident lands therein. Any such highway district shall consist of contiguous tracts or parcels of land, and may include parts of one or more towns; and they may be changed, altered or abolished at any time by the board. Such board may appoint one or more commissioners to lay out and construct such highways in any such district, and prescribe the powers and duties, and direct the manner in which highway taxes shall be assessed, levied and collected upon the lands within the district, and the manner of expenditure thereof.

They may also authorize such commissioners to borrow money on such terms as they may deem just, but not exceeding the amount of ten years' highway taxes upon such lands; and may, for the purpose of repaying such loan, set apart and appropriate the highway taxes upon such lands, for a period not exceeding ten years from the time of making such loan.

§ 75. Appropriation of certain non resident highway taxes.—The board may, upon the application of the owners representing a majority in value, as shall be ascertained from the last annual assessment roll of the real estate lying along the line of any highway, laid out through unimproved lands, in cases not provided for in the last preceding section, authorize the appropriation of the non-resident highway tax on the lands lying along such line, for the improvement of such highways.

§ 76. Balance of state appropriations.—The board may direct the expenditure of any non-resident highway or bridge tax, set apart by an act of the legislature, in counties wherein such non-resident lands are situated, when the official life of commissioners appointed to receive and expend such taxes has expired.

§ 77. Alteration of state roads.—The board may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities.

§ 78. Further powers.—The board may make such other local and private laws and regulations concerning highways, alleys, bridges and ferries within the county, and the assessment and apportionment of highway labor or taxes therefor, not inconsistent with law, as it may deem necessary and proper, when the purposes of such laws and regulations can not be accomplished under the foregoing provisions, or the general laws of the state.

§ 79. Powers as to tires on vehicles.—The board of supervisors may enact local and private laws regulating the width of tires used on vehicles built to carry a weight of fifteen hundred pounds or upwards, and may provide penalties for the violation thereof. (Added by L. 1894, chap. 644, and amended by L. 1899, chap. 155.)

The use of wide tires on highways is encouraged by allowing a rebate of highway tax therefor, see Highway Law, § 74, ante p. 146. Where boards of supervisors under the above section absolutely prohibit the use of certain wagons upon highways with tires of a certain width, the owners of wagons with wide tires are not entitled to such rebate. See L. 1904, chap. 324, amending Highway Law, § 74.

§ 80. Use of abandoned turnpike, plank or macadamized roads.—Boards of supervisors shall have power to provide for the use

of abandoned turnpike, plank or macadamized roads within any town as public highways; but jurisdiction in such a case shall not be exercised without the assent of two-thirds of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its minutes. (Added by L. 1895, chap. 756.)

Upon the dissolution of a turnpike or plank road corporation, the turnpike or plank road becomes a public highway, with the same effect as if laid out by the commissioners of highways of the town, and is subject to the laws relating to highways, and the erection, repairing and preservation of bridges thereon. Transportation Corporations Law, § 148 post. The above section authorizes boards of supervisors to assume control of such abandoned turnpike and plankroads. Such roads then become county roads, and subject to the provisions of law relating thereto.

The property of persons and corporations owning toll roads may be acquired by boards of supervisors as provided by L. 1899, chap. 594, post.

CHAPTER IV.

STATE ROADS.

1. Higbie-Armstrong Act. (L. 1898, chap. 115.)
2. Right of way. (L. 1901, chap. 240.)

1. Higbie-Armstrong Act.

L. 1898, ch. 115.—An Act to Provide for the Improvement of the Public Highways.

§ 1. Resolution of needed improvements.—The board of supervisors in any county of the state may, and upon presentation of a petition as provided in section two hereof, must pass a resolution that public interest demands the improvement of any public highway, or section thereof situate within such county, and described in such resolution, but such description shall not include any portion of a highway within the boundaries of any city or incorporated village, and within ten days after the passage of such a resolution shall transmit a certified copy thereof to the state engineer and surveyor.

§ 2. Petition of land owners.—The owners of a majority of the lineal feet fronting on any such public highway or section thereof in any county of the state may present to the board of supervisors of such county a petition setting forth that the petitioners are such owners and that they desire that such highway or section thereof be improved under the provisions of this act.

§ 3. Investigation and approval by state engineer.—Such state engineer upon receipt of such resolution shall investigate and determine whether the highway or section thereof sought to be improved is of sufficient public importance to come within the purposes of this act, taking into account the use, location and value of such highway or section thereof for the purposes of common traffic and travel, and after such investigation shall certify his approval or disapproval of such resolution. If he shall disapprove such resolution, he shall certify his reason therefor to such board of supervisors.

§ 4. Maps; width of road.—If he shall approve such resolution, such state engineer shall cause the highway or section thereof therein described to be mapped out both in outline and profile. He shall indicate how much of such highway or section thereof may be improved by deviation from the existing lines whenever it shall be deemed of advantage to obtain a shorter or more direct road without lessening its usefulness or wherever such deviation is of advantage by reason of lessened gradients. He shall also cause plans and specifications of such highway or section thereof to be thus improved to be made for telford, macadam or gravel roadway or other suitable construction, taking into consideration climate, soil and materials to be had in the vicinity thereof and the extent and nature of the traffic likely to be upon such highway, specifying in his judgment the kind of road a wise economy demands. The improved or permanent roadway of all highways so improved shall not be less than eight feet nor more than sixteen feet in width unless for special reasons to be stated by such state engineer it is required that it shall be of greater width. He shall if requested by the resolution include provision for steel plate or other flat rail construction in double track.

§ 5. Estimate of cost.—Upon the completion of such maps, plans and specifications such state engineer shall cause an estimate to be made of the cost of construction of the same and transmit the same to the board of supervisors from which such resolution proceeded, together with a certified copy of such maps, plans and specifications, and of his certificate of the approval of the highway or section thereof so designated as aforesaid.

§ 6. Resolution by supervisors to construct.—After the receipt thereof upon a majority vote of such board of supervisors, it may adopt a resolution that such highway or section thereof so approved shall be constructed under the provisions of this act, or of any existing act, and thereupon shall transmit a certified copy of such resolution to such state engineer, who is hereby authorized, empowered and directed to proceed with the construction of said highway in the order provided by section

eleven. When a board of supervisors has once adopted the resolution approving the plans and specifications of the state engineer and directing the raising of money for the county's share of the expense, no resolution thereafter adopted by such board shall have the effect of rescinding or annuling such prior resolution. This section shall apply in all respects to any county which may hereafter by a resolution of its board of supervisors rescind or attempt to rescind a resolution approving the plans and specifications of the state engineer for the construction of a highway under the provisions of this act. In the case of any highway which divides two or more counties, such resolution must be separately adopted by each county within which a portion of such highway lies; and the date of the receipt by the state engineer of a certified copy of the resolution passed by the board of supervisors last approving such plans, shall determine its place upon the list of roads to be taken up for construction as provided by section eleven of this act. (Amended by L. 1904, chap. 612.)

§ 7. Acquisition of right of way.—In case the boundaries of such proposed highway shall deviate from the existing highway, the board of supervisors must make provision for securing the requisite right of way prior to the actual commencement of the work of improvement.

§ 8. Contract, award, etc.—Upon receipt of the certified copy of the resolution, provided in section six, such state engineer shall advertise for bids for two successive weeks in a newspaper published at the county seat of such county, and in such other newspaper as shall be deemed of advantage for the construction of such highway or section thereof, according to such plans and specifications, and award such contract to the lowest responsible bidder, except that no contract shall be awarded at a greater sum than the estimate provided in section five. A board of supervisors of a county, or a town board of a town in which any portion of such highway lies may offer bids and be awarded such contracts for and on behalf of their respective counties and towns. But if no bid otherwise acceptable to be made within such estimate, such state engineer may amend his estimate, cer-

fify the same to the board of supervisors, and upon the adoption by it of a resolution as provided in section six based on such intended estimate, proceed anew to obtain bids and award the contract as herein provided. Such engineer may reject any or all bids, and before entering into any contract for such construction, he shall require a bond with sufficient sureties, conditioned that if the proposal shall be accepted the party thereto will perform the work upon the terms proposed and within the time prescribed and in accordance with the plans and specifications; and as a bond of indemnity against any direct or indirect damages that shall be suffered or claimed during the construction of such road and until the same is accepted. The people of the state of New York shall in no case be liable for any damages suffered. Partial payments may be provided for in the contract, and paid in the manner herein provided when certified to by such state engineer to an amount not to exceed ninety per centum of the value of the work done; ten per centum of the contract price shall be retained until the entire work has been accepted. (Amended by L. 1903, chap. 4, and L. 1904, chaps. 51 and 608.)

§ 9. Cost of construction.—One-half of the expense of the construction thereof shall be paid by the state treasurer upon the warrant of the comptroller, issued upon the requisition of such engineer, out of any specific appropriations made to carry out the provisions of this act. And one-half of the expense hereof shall be a county charge in the first instance, and the same shall be paid by the county treasurer of the county in which such highway or section thereof is, upon the requisition of such engineer, but the amount so paid shall be apportioned by the board of supervisors, so that if the same has been built upon a resolution of said board without petition, thirty-five per centum of the cost of construction shall be a general county charge; and fifteen percentum shall be a charge upon the town in which the improved highway or section thereof is located, and if the same has been built upon a resolution of said board after petition as provided in section two, thirty-five per centum shall be a general county charge and fifteen per centum shall be assessed upon and paid by the owners of the lands benefited

in the proportion of the benefits accruing to said owners as determined by the town assessors in the next section hereof.

§ 10. Duty of assessors.—The town assessors of any town in which any highway or section thereof has been improved or constructed pursuant to petition as provided in section two of this act, shall have power and it shall be their duty upon receiving notice from the board of supervisors of the county in which said town is located, of the cost of construction or improvement of such highway or section thereof in such town, to assess an amount equal to fifteen per centum of said total cost upon the lands fronting or abutting on such highway or section thereof. Such assessment shall be apportioned according to the benefits accruing to the owners of the lands so located, according to the best judgment of said assessors, upon at least ten days' notice of the time and place of such apportionment to the persons affected thereby, and after such persons have had an opportunity to be heard; and the assessments so made when duly attested by the oaths of such assessors shall be collected in the same manner as the general taxes of such town are collected. (Amended by L. 1899, chap. 92.)

§ 11. Order of construction.—The construction and improvement of highways and sections thereof, under the provisions of this act, shall be taken up and carried forward in the order in which they are finally designated, as determined by the date of the receipt in each case of the certified copy of the resolution provided in section six by such engineer as hereinbefore provided. But no highway shall be placed upon the list of highways to be constructed nor receive a consecutive number on such list unless the resolution provided by section six shall also appropriate and make immediately available for the state engineer for the construction of such highway, as provided by section nine, the county's half of the cost of the improvement of such highway. (Amended by L. 1904, ch. 299.)

§ 11-a. Right to close highway during construction.—Whenever a contract has been let for the construction of any such highway in accordance with the provisions of this act, the con-

itors may and are hereby authorized to, whenever the engineer in charge of the work on behalf of the state engineer and surveyor shall certify of the necessity thereof in writing, close such highway or section thereof to the public by putting up sufficient obstruction and notice to the effect that such highway is so closed. When such highway shall have been so closed to the public any person disregarding such obstruction and driving, riding or walking over any portion of such highway so closed shall be deemed guilty of a misdemeanor and shall be subject to the punishment imposed by law for the punishment of misdemeanors. Nothing herein contained, however, shall require the contractors of the burden of keeping highways under construction at all times open to the public until the engineer in charge of the work under the state engineer and surveyor shall be certified to the necessity for closing such highway and shall be filed such certificate in the office of the town clerk of the town or towns within which such highway or section thereof is located. (Added by L. 1904, chap. 298.)

12. Acceptance on completion; maintenance.—Upon the completion of such highways, or sections thereof, so constructed by such engineer, and his acceptance of the same, and after payment has been made as herein provided, such engineer shall inform the board of supervisors of such county that the highways or sections thereof designated have been constructed as herein provided; and he may serve notice on said board to accept such highway thus constructed, which notice shall be filed in the office of the clerk of said county; and twenty days after the service and filing of said notice, such highway or section thereof shall be deemed accepted by said board of supervisors of such county; and thereafter they shall maintain the same as a county road, and may apportion the expense thereof upon the town or towns which such board deems benefited thereby; and the commissioners of highways of the town or towns, respectively, wherein such improved highways lie shall care for and keep the same in repair, under the direction and supervision of the state engineer and surveyor and such rules and regulations as may prescribe. In case any highway which has been improved under this act shall, during the twenty day period here-

inbefore mentioned, become damaged by reason of the elements or other unforseen or unavoidable circumstances, the state engineer is hereby authorized to do the necessary work to place the road in proper condition, the expense thereof to be divided between the state and the county as provided by section nine. And if no moneys are available at the time of the work for the county's share of such expense, the entire amount thereof shall be paid by the state treasurer and one-half thereof shall be charged by the comptroller against the county in which such road shall be located and be included by the board of supervisors of such county in the next annual tax levy and assessed and paid as provided by sections nine and ten. If any board of supervisors or any commissioners of highways shall fail or neglect to properly perform the duties in regard to maintenance and repair which are imposed by this section within such time as may be prescribed by such engineer for the performance thereof, such engineer may cause the same to be performed and the expense thereof to be paid by the state treasurer out of any funds in his possession not otherwise appropriated, upon whom such engineer shall make draft therefor, and the amount thereof shall be charged by the comptroller against the county in which such improved highways shall be located, and be included by the board of supervisors of such county in its next annual tax levy as a county charge, unless the same be apportioned as above provided, in which case it shall be included in the tax so levied upon the town or towns to which it shall be apportioned. (Amended by L. 1902, chap. 53, and L. 1904, chap. 426.)

§ 12a. Right to enter upon private lands to construct and maintain ditches.—Whenever during the construction of any such highway, or after its completion, it may become necessary for the proper construction or maintenance thereof to open or maintain ditches or drains for the purpose of properly draining such highway, the highway commissioner of the town within which such highway or section thereof is situated shall have the right to enter upon any lands adjacent thereto and to open any existing ditch or drain or dig a new ditch or drain for the free passage of water for the purpose of draining such high-

way. Said highway commissioner shall also be empowered to agree with the owner of any such lands upon the amount of damages, if any, sustained by him in consequence of such entry upon his lands and performance of the work hereby authorized, and the amount of damages so agreed upon shall be a town charge and shall be audited and paid the same as other town charges. If the commissioner or commissioners of highways are unable to agree with such owner upon the amount of damages thus sustained, the amount thereof shall be ascertained and determined and paid in the same manner as damages are so ascertained, determined and paid where new highways are laid out and opened and the commissioners and land owners are unable to agree upon the amount thereof. If, however, the highway commissioner fails to properly drain or ditch any such highway or to exercise any of the powers herein conferred upon him, then the state engineer and surveyor may, upon giving to said highway commissioner or commissioners at least ten days' notice of his intention so to do, begin any proceeding hereby authorized to be begun by such highway commissioner, and is hereby vested with full powers to do all that the commissioner of highways might have done under this section, after the time named in the notice above prescribed shall have elapsed. (Added by L. 1904, chap. 297.)

§ 13. Highway taxes.—All persons owning property abutting on such road so improved, or residing thereon, shall thereafter pay all highway taxes assessed against them in money, and in the manner now provided by law.

§ 14. Connecting highways or sections.—Whenever any county has had aid in building any such highway, and it seems advantageous to such state engineer that a section or sections of highway, not exceeding one mile in length, should be constructed under this act to connect these roads together, and would be of great public utility and general convenience, he may serve notice on the board of supervisors of such county, and shall file one in the county clerk's office, designating the highways already constructed and the existing termini, and the section or sections, in his opinion, necessary to be constructed

and his reasons therefor. And it shall be the duty of the board of supervisors to provide for the construction of such connecting highway or section thereof, within one year after the service and filing of such notice under this act.

§ 15. Powers and duties of state engineer.—In addition to his other powers and duties, the state engineer and surveyor shall compile statistics relative to the public highways throughout the state, and shall collect all information in regard thereto deemed expedient. He shall investigate and determine upon various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of roads and bridges, and such other information relating thereto as he shall deem appropriate. He may be consulted at all reasonable times by county, city, town or village officers having care and authority over highways and bridges, and shall advise such officers relative to the construction, repair, alteration, or maintenance of the same; and shall furnish such other information and advice as may be requested by persons interested in the construction and maintenance of public highways, and shall, at all times, lend his aid in promoting highway improvement throughout the state. He shall hold in each year at least one public meeting in each county, and shall cause due notice of such meeting to be given. He shall cooperate with all highway officers and shall assist county and town authorities, and when requested by them, furnish them with plans and directions for the improvement of the public highways and bridges.

§ 16. Annual report.—He shall report annually to the legislature concerning all the work performed by him, together with such recommendations upon the subject of highway construction and maintenance as to him shall seem appropriate.

§ 17. Information to be furnished state engineer.—The commissioners of highways and town board of any town, and the board of supervisors of any county, and all other officers who now have or may hereafter have by law the care and supervision of the public highways and bridges shall, from time to time, upon his written request, furnish him with all available

information in connection with the building and maintenace of the public highways and bridges in their respective localities.

§ 18. Act not affected.—The operation of this act shall not be affected by any special act, but the highways may be improved under this act or such special act wherever the same may now exist.

§ 19. Street surface railroads.—No street surface railroad shall be constructed upon a portion of a highway, which portion has been or may be hereafter improved under the provisions of this act and the acts amendatory thereof and supplemental thereto, except upon the consent of, and under such conditions and regulations as may be prescribed by the state engineer and surveyor. (Added by L. 1902, chap. 379.)

2. Right of way.

L. 1901, ch. 240—An Act supplementary to chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, entitled “An act to provide for the improvement of public highways,” relative to securing the requisite right of way by the boards of supervisors of counties in which public highways are improved pursuant to said chapter.

§ 1. Board of supervisors to procure right of way for improved roads.—In any county of the state in which a public highway is improved pursuant to the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, entitled “An act to provide for the improvement of public highways” and the acts amendatory thereof, the boards of supervisors of said counties may make provisions for obtaining the right of way required as hereinafter provided.

§ 2. Purchase of land.—The board of supervisors of any county in which land is required to be taken for the improvement of highways under chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, or supplemental thereto, where the boundaries of any proposed highway shall deviate from any existing highway, or where land is required for the purpose of obtaining gravel,

stone, or other materials, for the construction or maintenance of such highways or required for spoil banks, may acquire such land together with the right of way to any bed, pit, quarry, spoil bank or other place in which the same is located, by purchase, provided that the price paid for such land or right of way required shall not in any one case to any one claimant exceed two hundred dollars, except with the written approval of the county judge and county treasurer, in which case it shall not exceed one thousand dollars; and the said board of supervisors may, by resolution, passed for that purpose, authorize its chairman, or a member, or a committee therefrom to make purchases as provided in this section; and said board may pass resolutions providing for the payment of land purchased as provided for in this section, the same to be a county charge in the first instance and to be paid in the manner hereinafter specified for the payment of awards in cases where condemnation proceedings are required. (Amended by L. 1902, chap. 510.)

§ 3. Appointment of commissioners of appraisal.—In case the board of supervisors may not be able to acquire the land by purchase as provided for in the last section, the board of supervisors may present to the county court of the county or to the supreme court, at a special term thereof, to be held in the judicial department in which said county is located, a petition for the appointment of three commissioners of appraisal to ascertain and determine the compensation to be made to the owners and all other persons in any manner interested in any and all real estate over which such right of way is required. Such petition shall describe the land to be acquired, a reference to the map upon which the same is shown and shall have annexed thereto said map or diagram showing the land to be acquired. Such petition shall be signed in the name of the board of supervisors by the chairman thereof or by any member thereof designated for that purpose by resolution, and shall be verified by the said chairman or by any member thereof designated by resolution as aforesaid. Notice of presentation of such petition to such court shall be given by the petitioner by publishing such notice in two newspapers published in such county, once in each week for two weeks successively preceding the day of

such presentation, and also by posting a copy of said notice in not less than three public places in each town in which property to be acquired is located, at least eight days preceding the day of such presentation.

§ 4. Court may appoint three commissioners.—Upon such presentation, such court shall, after hearing any person interested or claiming to be interested in any land to be acquired in such proceeding who may appear, appoint three disinterested persons as commissioners. And in case any of such commissioners shall at any time decline to serve, or die, or for any cause become disqualified or disabled from serving as such, the said court, at a similar special term, may upon similar notice, application and hearing, and upon such notice to the land owners as the court may prescribe, appoint another or other person, similarly qualified to fill the vacancy or vacancies and to act in their place and stead.

§ 5. Powers and duties of commissioners.—The said commissioners shall take the oath of office prescribed by the constitution of this state, which oath shall be filed in the office of the county clerk of such county. The commissioners shall with all reasonable diligence proceed to examine such highways and lands to be acquired and may enter upon such lands for such purpose. Said commissioners shall cause a notice to be published in two such newspapers as aforesaid, once each week for two weeks successively next preceding the day of meeting mentioned in such notice, that at a stated time and place within said county they will meet for the purpose of hearing any and all parties interested or claiming to be interested in the damages to be awarded for the lands to be taken for such highways: Said notice shall also state the fact that a map or maps showing the land to be acquired has been filed in the county clerk's office. At the time and place of said meeting and at any adjournment thereof which said commissioners may publicly make, they shall hear the proofs and allegations of any and all parties interested or claiming to be interested in the amount of said damages. Said commissioners may adjourn the proceedings before them from time to time, issue subpoenas or administer oaths in such

proceedings; and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them. The said commissioners shall thereafter make and sign a report in writing, in which they shall assess, allow and state the amount of damages to be sustained by the owners of the several lots, pieces or parcels of land to be taken for the purposes aforesaid. Such report shall contain the name or names of such owners, or owner of any parcel of land to be acquired as aforesaid except in case the commissioners are unable to ascertain the name or names of the owner or owners of any parcel of land to be acquired as aforesaid, they may in place of the names of such undiscovered parties insert the words, "unknown owners" in their report. The said commissioners shall file their said report, together with the minutes of their proceedings in the office of the county clerk of such county. After said report shall have been completed and filed as aforesaid, the commissioner shall, after publishing a notice in like manner as that provided in the first section hereof for the publication of the notice therein provided for, apply to the county court of the county or to the supreme court, at a special term thereof to be held in the judicial department in which said county is located, to have the said report confirmed. If no sufficient reason to the contrary shall appear, the court shall confirm said report. Otherwise it may refer the same back to the said commissioners for revision or correction; and after such revision or correction the same proceedings shall be taken as are hereinbefore provided for, and the commissioners shall in the same manner make renewed application for the confirmation of such report, and the court shall thereupon confirm or refer back the said report and such proceedings shall be repeated until a report shall be presented which shall be confirmed by the said court.

§ 6. Payment of awards.—Within six months after the report of said commissioners shall be confirmed as aforesaid, the county treasurer of such county shall pay to the several respective persons named in such report respectively the amounts awarded to them therein for damages as aforesaid with six per centum interest thereon from the day of the confirmation of said report, which amounts with such interest and the amounts

paid in pursuance of section two of this act are hereby made and declared to be a county charge in the first instance, and the same shall be paid by the county treasurer; in cases under section two of this act, upon requisition of the chairman of the board of supervisors of said county or by any member thereof or by a committee therefrom designated for that purpose by said board and in cases under section five of this act upon service of a certified copy of the order confirming the said awards. The amounts so paid and the cost of the proceedings to acquire the land shall be a general county charge. In case there are unknown owners, to whom the award is made in said report, the said county treasurer shall deposit the amounts awarded to them with like interest in some trust company or bank in such manner as the said court shall in the order of confirmation direct, such amounts to be paid out upon the application of said unknown owners when discovered. From the date of the confirmation of such report by the order of the said court the title to all the lands therein designated shall vest in said county for the purposes of a highway forever.

§ 7. Costs; compensation of commissioners.—In all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be a county charge in the first instance and be paid by the county treasurer as hereinbefore provided, except when reassessment of damages shall be had on the application of the party for whom damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment and when application shall be made by two or more persons for reassessment of damages all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered by action. Each commissioner appointed by the court as provided in this chapter for each full day necessarily employed as such, shall be entitled to the sum of six dollars and his necessary expenses. The amount of compensation to which such commissioners are entitled shall be determined by the court in which the proceeding is pending, upon verified accounts presented by such commissioners, stating in detail the

number of hours, necessarily employed in the discharge of their duties, and the nature of the services rendered. The audit and determination of the court as to the amount justly due shall be final. (Amended by L. 1902, chap. 510.)

§ 8. Lands acquired may be sold or leased by county.—Any lands acquired by purchase or condemnation, pursuant to the provisions of the act hereby amended, for the purpose of obtaining gravel, stone, or other materials, for the construction or maintenance of highways improved or constructed as provided in said chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, or required for spoil-banks, may be sold or leased by the board of supervisors of any county, when no longer needed for any such purposes. The proceeds thereof shall be paid into the county treasury and shall be retained therein as a separate fund available for the construction or maintenance of highways improved or constructed under such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight. (Added by L. 1902, chap. 510.)

CHAPTER V.

Railroads Crossing and upon Highways.

1. Street railroads upon highways.
2. Railroads intersecting or upon highways.
3. Grade crossings.
 - a. Steam surface railroads not to cross highways at grade.
 - b. Laying out new streets or highways over railroads; notice to corporation; manner of crossing.
 - c. Changes in existing crossings.
 - d. Lands acquired by towns, etc.
 - e. Cost of maintaining bridge and subway.
 - f. Payment of cost of construction.
 - g. Railroad commissioners may institute proceedings to alter grade crossings.
 - h. Proceedings to enforce compliance with recommendations of board.
 - i. Town may borrow money and issue bonds.
4. Ringing bells and blowing whistles at crossings; obstruction of crossings.
5. Sign boards and flagmen at crossings.

1. Street railroads upon highways.—The charter of a street railroad corporation must contain the names and description of the streets, avenues and highways in which the road is to be constructed. Railroad Law, § 2, sub. 11. A street surface railroad corporation proposing to extend its road or to construct branches thereof may file in the office in which its certificate of incorporation is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches. Upon filing such statement and upon complying with the conditions set forth in section 91 of the Railroad Law, such corporation shall have the power and privilege to construct, extend, operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation, or in such statement. Railroad Law, § 90.

Sections 91 and 92 of the Railroad Law relate to the consent of property owners and local authorities for the construction of street surface railroads upon highways. The portion of

such sections appertaining to the use of highways by such railroads is here inserted in full:

Consent of property owners and local authorities.—A street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing acknowledged or proved as are deeds entitled to be recorded, of the owners in cities and villages, of one-half in value, and in towns, not within the corporate limits of a city or village, of the owners of two-thirds in value, of the property bounded on and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, extension or branch shall have been first obtained. The consents of property owners in one city, village or town, or in any other civil division of the state, shall not be of any effect in any other city, village or town, or other civil divisions of the state. Consents of property owners heretofore obtained to the building, extending, operating or change of motive power shall be effectual for the purposes therein mentioned and may be deemed to be sufficiently proved and shall be entitled to be recorded, whenever such consents shall have been signed, executed or acknowledged before an officer authorized by law to take acknowledgments of deeds, or before or in the presence of a subscribing witness, and without regard to whether or not the subscribing witness shall have affixed his signature in the presence of the subscriber, provided that the proof of such signing, execution or acknowledgment shall have been made by such subscribing witness in the manner prescribed by chapter three, part two of the revised statutes.
* * * * The value of the property above specified shall be ascertained and determined by the assessment roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent, except property owned by such city, village or town, or by the state of New York, or the United States of America, the value of which shall be ascertained and determined by making the value thereof to be the same as is shown by such assessment roll to be the value of the equivalent in size and frontage of the adjacent property on the same street or highway; and the con-

sent of the local authorities shall operate as the consent of such city, village or town as the owners of such property. Whenever heretofore or hereafter a railroad has been or shall be constructed and put in operation for one year or the motive power thereon has been or shall be changed and put in operation for a similar length of time, such facts shall be presumptive evidence that the requisite consents of local authorities, property owners and other authority to the construction, maintenance and operation of such railroad or change of motive power have been duly obtained. No consent of local authorities heretofore given shall be deemed invalid because of any portion of the road or route consented to not being connected with an existing road or route of the corporation obtaining or acquiring such consent and all statements of extension filed under section ninety of this article in reference to the route or part thereof described in any consent of local authorities are hereby ratified and confirmed, whether the same were filed before or after the obtaining or acquiring of such consents, provided however that nothing herein contained shall be construed to affect any portion of a street surface railroad which is now in or upon any portion of a street which is under the jurisdiction of a park department in any city containing a population of over twelve hundred thousand inhabitants. [Railroad Law, (L. 1890, chap. 565) § 91, as amended by L. 1903, chap. 537.]

Consent of local authorities; how procured.—The application for the consent of the local authorities shall be in writing and before acting thereon such authorities shall give public notice thereof and of the time and place when it will first be considered, which notice shall be published daily in any city for at least fourteen days in two of its daily newspapers if there be two, if not, in one, to be designated by the mayor, and in any village or town for at least fourteen days in a newspaper published therein, if any there shall be, and if none, then daily in two daily newspapers if there be two, if not, one published in the city nearest such village or town. Such consent must be upon the expressed condition that the provisions of this article pertinent thereto shall be complied with, and shall be filed in the office of the clerk of the county in which such railroad is located.

* * * * Any such notice, publication or consideration heretofore or hereafter given, made or had in substantial conformity with the requirements of this section, is and shall be sufficient notice, publication and consideration for all the purposes hereof notwithstanding any conflicting provision of any local or special act or charter. (Railroad Law, § 92, as amended by L. 1892, chap. 676, and L. 1893, chap. 434.)

2. Railroads intersecting or upon highways.—Section 11 of the Railroad Law reads as follows:

"No railroad corporation shall erect any bridge or other obstruction across, in or over any stream or lake, navigated by steam or sail boats at the place where it may be proposed to be erected, nor shall it construct its road in, upon or across any street of any city without the assent of the corporation of such city, nor across, upon or along any highway in any town or street in any incorporated village, without the order of the supreme court of the district in which such highway or street is situated, made at a special term thereof, after at least ten days' written notice of the intention to make application for such order shall have been given to the commissioners of highways of such town, or board of trustees of the village in which such highway or street is situated. Every railroad corporation which shall build its road along, across or upon any stream, water-course, street, highway, plankroad or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plankroad and turnpike, thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway, turnpike or plankroad may be carried by it, under or over its track, as may be found most expedient. Where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, with a view to a more easy ascent or descent, it may construct such highway, turnpike or plankroad, on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary. Such lands so taken shall become part of such intersecting highway, turnpike or plankroad, and shall be held in the same manner and by the same tenure as the ad-

jacent parts of the highway, turnpike or plankroad are held for highway purposes. Every railroad corporation shall pay all damages sustained by any turnpike or plankroad corporation in consequence of its crossing or occupation of any turnpike or plankroad, and in case of inability to agree upon the amount of such damages it may acquire the right to such crossing or occupation by condemnation."

Highway commissioners may compel a railroad corporation to perform the duties prescribed by this section. See Highway Law, § 15, and note thereto, ante, p. 56.

3. Grade crossings—*a. Steam surface railroads not to cross highways at grade.*—All steam surface railroads, hereafter built except additional switches and sidings, must be so constructed as to avoid all public crossings at grade, whenever practicable so to do. Whenever application is made to the board of railroad commissioners, under section fifty-nine of the railroad law, there shall be filed with said board a map showing the streets, avenues and highways proposed to be crossed by the new construction, and the said board shall determine whether such crossings shall be under or over the proposed railroad, except where said board shall determine such method of crossing to be impracticable. Whenever an application is made under this section to determine the manner of crossing, the said board shall designate a time and place when and where a hearing will be given to such railroad company, and shall notify the municipal corporation having jurisdiction over such streets, avenues or highways proposed to be crossed by the new railroad. The said board shall also give public notice of such hearing in at least two newspapers, published in the locality affected by the application, and all persons owning land in the vicinity of the proposed crossings shall have the right to be heard. The decision of the said board rendered in any proceedings under this section shall be communicated, within twenty days after final hearing, to all parties to whom notice of the hearing in said proceedings was given, or who appeared at said hearing by counsel or in person. (Railroad Law, § 60, as added by L 1897, chap. 754.)

b. Laying out new streets on highways over railroads; notice to corporation; manner of crossing.—When a new street, avenue or highway, or new portion of a street, avenue or highway shall hereafter be constructed across a steam surface railroad, other than pursuant to the provisions of section sixty-two of this act, such street, avenue or highway or portion of such street, avenue or highway, shall pass over or under such railroad or at grade as the board of railroad commissioners shall direct. Notice of intention to lay out such street, avenue or highway, or new portion of a street, avenue or highway, across a steam surface railroad, shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue or highway by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. Such notice shall designate the time and place and when and where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue or highway. If the municipal corporation determines such street, avenue or highway to be necessary, it shall then apply to the board of railroad commissioners before any further proceedings are taken, to determine whether such street, avenue or highway shall pass over or under such railroad, or at grade, whereupon the said board of railroad commissioners shall appoint a time and place for hearing such application, and shall give such notice thereof, as they judge reasonable, not, however, less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue or highway, or new portion of a street, avenue or highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue or highway to be opened or extended. The said board of railroad commissioners shall determine whether such street, avenue or highway, or new portion of a street, avenue or highway, shall be constructed over or under such railroad or at grade; and if said board determine that such street, avenue or highway shall be carried across such railroad above grade, then said board shall

determine the height, the length and the material of the bridge or structure by means of which such street, avenue or highway shall be carried across such railroad, and the length, character and grades of the approaches thereto; and if said board shall determine that such street, avenue or highway shall be constructed or extended below the grade, said board shall determine the manner and method in which the same shall be so carried under, and the grade or grades thereof, and if said board shall determine that said street, avenue or highway shall be constructed or extended at grade, said board shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained. The decision of the said board as to the manner and method of carrying such new street, avenue or highway, or new portion of a street, avenue or highway, across such railroad, shall be final, subject, however, to the right of appeal hereinafter given. The decision of said board rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in such proceeding was given or who appeared at such hearing by counsel or in person. (Railroad Law, § 61, as added by L. 1897, chap. 754, and amended by L. 1898, chap. 520.)

c. **Changes in existing crossings.**—The mayor and common council of any city, the president and trustees of any village, the town board of any town within which a street, avenue or highway crosses or is crossed by a steam surface railroad at grade, or any steam surface railroad company, whose road crosses or is crossed by a street, avenue or highway at grade, may bring their petition, in writing, to the board of railroad commissioners, therein alleging that public safety requires an alteration in the manner of such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing and discontinuance of a highway crossing and the diversion of the travel thereon to another highway or crossing, or if not practicable to change such crossing from grade or to close and discontinue the same, the opening of an additional crossing for the partial diversion of travel from the grade crossing, and

praying that the same may be ordered; whereupon the said board of railroad commissioners shall appoint a time and place for hearing the petition, and shall give such personal notice thereof as they shall judge reasonable, of not less than ten days, however, to said petitioner, the railroad company, the municipality in which such crossing is situated, and to the owners of the lands adjoining such crossing and adjoining that part of the highway to be changed in grade or location, or the land to be opened for a new crossing, and shall cause notice of said hearing to be advertised in at least two newspapers published in the locality affected by the application; and after such notice of hearing the said board of railroad commissioners shall determine what alterations or changes, if any, shall be made. The decision of said board of railroad commissioners rendered in any proceeding under this section, shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person. Any person aggrieved by such decision, or by a decision made pursuant to sections sixty and sixty-one hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated and to the court of appeals, in the same manner and with like effect as is provided in the case of appeals from an order of the supreme court. (Railroad Law, § 62, as added by L. 1897, chap. 754, and amended by L. 1898, chap. 520, and L. 1899, chap. 359.)

In the case of *Matter of Town Board v. Fitchburg R. R. Co.*, 53 App. Div. 16, aff'd 169 N. Y. 609, it was held that the objection that the petition filed by the town board of the town of Schaghticoke for the abolition of a grade crossing at Melrose, New York, is insufficient, in that it does not allege that Melrose is in the town of Schaghticoke, and the further objection, interposed by the party represented at the hearing, that proper notice was not given to the railroad commissioners, cannot be raised for the first time upon an appeal from the order granting the prior petition.

d. Lands acquired by towns, etc.—The municipal corporation in which the highway crossing is located, may, with the approval of the railroad company, acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of section sixty, sixty-one and sixty-two of this act, but if unable to do so shall acquire such lands, rights or easements by condemnation either under the condemnation law, or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein. (Railroad Law, § 63, as added by L. 1897, chap. 754, and amended by L. 1899, chap. 226.)

e. Cost of maintaining bridge and subway.—When a highway crosses a railroad by an overhead bridge, the frame work of the bridge and its abutments, shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality in which the same are situated; except that in the case of any overhead bridge, constructed prior to the enactment of sections sixty-one and sixty-two of this act, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligations shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the commissioner of highways or other duly constituted authorities, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality in which the same are situated. (Railroad Law, § 64, as added by L. 1897, chap. 754 and amended by L. 1902, chap. 140.)

This section is not limited in its application to railroads constructed subsequent to its enactment or to bridges over crossings thereafter constructed, but applies to all bridges constitut-

ing the highway at railroad crossings whether constructed before or after the law went into effect. *City of Yonkers v. N. Y. C. & H. R. R. Co.*, 165 N. Y. 142.

f. Payment of cost of construction.—Whenever, under the provisions of section sixty of this act, new railroads are constructed across existing highways, the expense of crossing above or below the grade of the highway shall be paid entirely by the railroad corporations. Whenever under the provisions of section sixty-one of this act a new street, avenue or highway is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation wherein such street, avenue or highway is located, shall pay the remaining one-half of the expense of making such crossing above or below grade; and whenever a change is made as to an existing crossing in accordance with the provisions of section sixty-two of this act, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation, and twenty-five per centum by the state. Whenever, in carrying out the provisions of sections sixty-one or sixty-two of this act, two or more lines of steam surface railroad, owned and operated by different corporations, cross a highway at a point where a change in grade is made, each corporation shall pay such proportion of fifty per centum of the expense thereof as shall be determined by the board of railroad commissioners. In carrying out the provisions of sections sixty, sixty-one and sixty-two of this act the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision of and approval of the board of railroad commissioners, and in all cases, except where the entire expense is paid by the railroad corporation, the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements, shall be paid primarily by the municipal corporation wherein such highway crossings are located. Plans and specifications of all changes proposed under sections sixty-one and sixty-two of this act, and an estimate of the expense thereof shall be submitted to the board of railroad commissioners for their approval before the letting of any contract. In case the work is done by con-

tract the proposals of contractors shall be submitted to the board of railroad commissioners, and if the board shall determine that the bids are excessive it shall have the power to require the submission of new proposals. The board of railroad commissioners may employ temporarily such experts and engineers as may be necessary to properly supervise any work that may be undertaken under sections sixty, sixty-one or sixty-two of this act, the expense thereof to be paid by the comptroller upon the requisition and certificate of the said board, said expense to be included in the cost of the particular change in grade on account of which it is incurred and finally apportioned in the manner provided in this section. Upon the completion of the work and its approval by the board of railroad commissioners an accounting shall be had between the railroad corporation and the municipal corporation, of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation have expended more than their proportion of the expense of the crossing as herein provided, a settlement shall be forthwith made in accordance with the provisions of this section. All items of expenditure shall be verified under oath, and, in case of a dispute between the railroad corporation and the municipal corporation as to the amount expended, any judge of the supreme court in the judicial district in which the municipality is situated, may appoint a referee to take testimony as to the amount expended, and the confirmation of the report of the referee shall be final. In the event of the failure or refusal of the railroad corporation to pay its proportion of the expense, the same, with interest from the date of such accounting, may be levied and assessed upon the railroad corporation and collected in the same manner that taxes and assessments are now collected by the municipal corporation within which the work is done; and in the event of the failure or refusal of the municipal corporation to pay its proportion of the expense, suit may be instituted by the railroad corporation for the collection of the same with interest from the date of such accounting, or the railroad corporation may offset such amount with interest against any taxes levied or assessed against it or its property by such municipal corporation. The

legislature shall annually appropriate out of any moneys not otherwise appropriated the sum of one hundred thousand dollars for the purpose of paying the state's proportion of the expense of a change in an existing grade crossing. If, in any year, any less sum than one hundred thousand dollars is expended by the state for the purpose aforesaid, the balance remaining unexpended shall be applied to reduce the amount appropriated by the state in the next succeeding year, except that no such deduction shall be made in case there are outstanding and unadjusted obligations on account of a change in an existing grade crossing for a proportion of which the state is liable under the provisions of this section. In the event of the appropriation made by the state in any one year being insufficient to pay the state's proportion of the expense of any change that may be ordered, the first payment from the appropriation of the succeeding year shall be on account of said change, and no payment shall be made on account of any subsequent change that may be ordered, nor shall any subsequent change be ordered until the obligation of the state on account of the first named change in grade has been fully discharged, unless the same shall be provided for by an additional appropriation to be made by the legislature. The state's proportion of the expense of changing any existing grade crossing shall be paid by the state treasurer on the warrant of the comptroller, to which shall be appended the certificate of the board of railroad commissioners to the effect that the work has been properly performed and a statement showing the situation of the crossing that has been changed, the total cost and the proportionate expense thereof, and the money shall be paid in whole or in part to the railroad corporation or to the municipal corporation as the board of railroad commissioners may direct, subject, however, to the rights of the respective parties as they appear from the accounting to be had as hereinbefore provided for. No claim for damages to property on account of the change or abolishment of any crossing under the provisions of this act shall be allowed unless notice of such claim is filed with the board of railroad commissioners within six months after completion of the work necessary for such change or abolishment. (Railroad Law,

§ 65, as added by L. 1897, chap. 754, and amended by L. 1898, chap. 520, and L. 1900, chap. 517.)

g. Railroad commissioners may institute proceedings to alter grade-crossings.—The railroad commissioners may, in the absence of any application therefor, when, in their opinion, public safety requires an alteration in an existing grade crossing, institute proceedings on their own motion for an alteration in such grade crossing, upon such notice as they shall deem reasonable, of not less than ten days, however, to the railroad company, the municipal corporation and the person or persons interested, and proceedings shall be conducted as provided in section sixty-two of this act. The changes in existing grade crossings authorized or required by the board of railroad commissioners in any one year shall be so distributed and apportioned over and among the railroads and the municipalities of the state as to produce such equality of burden upon them for their proportionate part of the expenses as herein provided for as the nature and circumstances of the cases before them will permit. (Railroad Law, § 66, as added by L. 1897, chap 754.)

h. Proceedings to enforce compliance with recommendations of board.—It shall be the duty of the corporation, municipality or person or persons to whom the decisions or recommendations of the board of railroad commissioners are directed, as provided in sections sixty, sixty-one, sixty-two and sixty-six of this act, to comply with such decisions and recommendations, and in case of their failure so to do, the board shall present the facts in the case to the attorney-general, who shall thereupon take proceedings to compel obedience to the decisions and recommendations of the board of railroad commissioners. The supreme court at a special term shall have the power in all cases of such decisions and recommendations by the board of railroad commissioners to compel compliance therewith by mandamus, subject to appeal to the appellate division of the supreme court and the court of appeals, in the same manner, and with like effect, as is provided in case of appeals from any order of the supreme court. (Railroad Law, § 67, as added by L. 1897, chap. 754.)

i. Town may borrow money and issue bonds.—Whenever in carrying out any of the provisions of sections sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, or sixty-seven of this act, any municipality shall incur any expense or become liable for the payment of any moneys, it shall be lawful for such municipality to temporarily borrow such moneys on the notes or certificates of such municipality, and to include the amount of outstanding notes or certificates, or any part thereof, in its next annual tax levy for municipal purposes, or in the discretion of the common council in case of a city, the board of trustees in case of a village or the town board in case of a town, to borrow the same, or any part thereof, on the credit of the municipality, and to issue bonds therefor, which bonds shall be signed by the mayor and clerk in case of a city, the president and clerk in case of a village and the town board in case of a town, and shall be in such form and for such sums and be payable at such times and places with interest not exceeding four per centum per annum, as the common council in case of a city, the board of trustees in case of a village, and the town board in case of a town, shall direct. (Railroad Law, § 67a, as added by L. 1899, chap. 541 and amended by L. 1902, chap. 198.)

4. Ringing bells and blowing whistles at crossings; obstruction of crossings.—Section 421 of the Penal Code provides as follows: "A person acting as engineer, driving a locomotive on any railway in this State, who fails to ring the bell, or sound the whistle, upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing of such bell or sounding such whistle at intervals, until such locomotive and the train to which the locomotive is attached shall have completely crossed such road or street, or any officer or employe of a corporation in charge of a locomotive, train or car, who shall wilfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive, train or car for a longer period than five consecutive minutes, is guilty of a misdemeanor."

5. Sign boards and flagmen at crossings.—Every railroad corporation shall cause a sign board to be placed, well supported

and constantly maintained, at every crossing where its road is crossed by a public highway at grade. Such sign board shall be of a shape and design to be approved by the board of railroad commissioners, and shall have suitable words painted thereon to warn travelers of the existence of such grade crossing. The board of railroad commissioners shall have power to prescribe the location and elevation of such sign and the words of warning thereon. The commission may dispense with the use of such sign boards at such crossings as they may designate in cities and villages. At any point where a railroad crosses a street, highway, turnpike, plank-road, or traveled way at grade, or where a steam railroad crosses a horse railroad at grade, and the corporation owning or operating such railroad, refuses, upon request of the local authorities, to station a flagman or erect gates, to be opened and closed when an engine or train passes, the supreme court or the county court, may upon the application of the local authorities and upon ten days' notice to the corporation, order that a flagman be stationed at such point, or that gates shall be erected thereat, and that a person be stationed to open and close them when an engine or train passes, or may make such other order respecting the same as it deems proper. Whenever the crossing by a railroad at grade of the streets, highways, turnpike, plank roads, or traveled ways of any village or city, having a population by the last state or federal enumeration of less than fifty thousand, shall be protected by gates with persons to open and close the same, when an engine or train passes, the local authorities of the city or village shall not impose any limitation, less than forty miles an hour, on the rate of speed at which such engine or train shall be run, or enforce any existing limitation upon such rate of speed, less than forty miles an hour. (Railroad Law, § 33, as amended by L. 1892, chap. 676, and L. 1901, chap. 301.)

CHAPTER VI.

Pipe Lines, Gas and Water Mains, Electric Light, Telegraph and Telephone Wires in Highways.

1. Pipe lines in highways.
 - a. Railroad, turnpike, plank road and highway crossings.
 - b. Construction across and along canals, rivers and creeks.
 - c. Consent of local authorities.
2. Use of highways by gas and electric light corporations.
 - a. Powers of gas corporations.
 - b. Of electric light corporations.
 - c. Pipes for conducting steam.
3. Rights of water works corporations in highways.
 - a. Permit of local authorities; incorporation.
 - b. Power to use highways.
4. Construction of telegraph and telephone lines in highways.
5. Laying pipes for heating purposes in highways.

1. **Pipe lines in highways.—a. Railroad, turnpike, plank-road and highway crossings.**—Whenever any line of pipe of any such (pipe line) corporation shall necessarily cross any railroad, highway, turnpike or plank-road, such line of pipe shall be made to cross under such railroad, highway, turnpike or plank-road and with the least injury thereto practicable, and unless the right to cross the same shall be acquired by agreement, compensation shall be ascertained and made to the owners thereof, or to the public in case of highways, in the manner prescribed in the condemnation law, but no exclusive title or use shall be so acquired as against any railroad, turnpike or plank-road corporation, nor as against the rights of the people of this state in any public highway, but the rights acquired shall be a common use of the lands in such manner as to be of the least practical injury to such railroad, turnpike or plank-road, consistent with the use thereof by such pipe-line corporation, nor shall any such corporation take or use any lands, fixtures or erections of any railroad corporation, or have the right to acquire by condemnation the title or use, or right to run along or upon the lands of any such corporation, except for the purpose of directly crossing the same when necessary. (Transportation Corporations Law, § 43.)

b. Construction across and along canals, rivers and creeks.— No pipe line shall be constructed upon or across any of the

canals of this state, except by the consent of and in the manner and upon the terms prescribed by the superintendent of public works, unless constructed upon a fixed bridge across such canal, and with the consent of the person for whose benefit such bridge is constructed and maintained, or upon such a bridge over the canal, at the crossing of a public highway or street, with the consent of the public officers having the supervision thereof, or of the municipal authorities of any village or city within whose limits such bridge may be, nor shall the pipes of any such corporation be laid through or along the banks of any of the canals of this state, nor through or under any of its rivers or creeks unless such pipes shall be encased so as to prevent leakage, in such manner as shall be approved by the superintendent of public works. (Transportation Corporations Law, § 44.)

c. **Consent of local authorities.**—No pipe line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section can not be obtained, application may be made to the general term of the supreme court of the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or an order to show cause, and the court upon the hearing of the application may grant an order permitting the line to be so constructed in such manner and upon such terms as it may direct. (Transportation Corporations Law, § 45.)

2. **Use of highways by gas and electric light corporations.**—

a. **Powers of gas corporations.**—Such a corporation has power, "if incorporated for the purpose of supplying gas for light, to manufacture gas, and to acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas as may be

required in each city, town and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authorities shall have power to exempt any such corporation from taxation on their personal property for a period not exceeding three years from the organization of the corporation. Any corporation authorized under any general or special law of this state to manufacture and supply gas shall have the like powers and privileges." (Transportation Corporations Law, § 61, sub. 1, as amended by L. 1900, chap. 575 and L. 1902, chap. 596.)

A gas-light company has no authority to lay its pipes in a country highway, without the consent of, or without the appraisal and payment of compensation to, the owner of abutting land. Bloomfield Gas-light Co. v. Calkins, 62 N. Y. 386.

A grant by town authorities to a gas-light company to lay conductors without any expressed limitation in the streets and highways of the town, is not to be deemed restricted to existing streets and highways, but extends to streets and highways subsequently opened. If a portion of the town is subsequently incorporated into a village the change from town to village government does not alter the rights of the gas-light company. People ex rel Woodhaven Gas-light Co. v. Deehan, 153 N. Y. 528.

b. Of electric light corporations.—Such a corporation has power, "if incorporated for the purpose of using electricity for light, heat or power, to carry on the business of lighting by electricity or using it for heat or power in cities, towns and villages within this state, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity; and to make, sell or lease all machines, instruments, apparatus and other equipments therefor, and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under

the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe." (Transportation Corporations Law, § 61, sub. 2.)

Electric light poles and wires in public highways do not constitute an additional burden upon the fee for which the abutting owner is entitled to compensation, where it is shown that the condition of the highway is such that the light to be furnished by means of such poles and wires will facilitate the public use of such highways. The question as to whether or not the public use of the highway requires the light is primarily within the determination of the municipal authorities of the town. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231. In this case the doctrine is stated that the lighting of a highway is a street purpose, and is within the grant of lands for highway purposes whenever the necessity for such use arises; and the erection and maintenance of poles and electric wires for that purpose within the lighted highway, without compensation to the abutting owner of the fee, is permissible as distinguished from telegraph and telephone poles and wires, which do not aid the public in traveling the highway.

c. Pipes for conducting steam.—Any corporation organized under article six of the Transportation Corporations Law "or under any general or special law of this state for the purpose of using electricity for light, heat or power in cities, other than of the first class, towns or villages within this state, may have and acquire the following additional powers, to wit: the power of supplying steam to consumers from a central station or stations through pipes laid in the public streets of the cities, towns and villages within this state, and for that purpose to lay, construct and maintain suitable pipes and conduits or other fixtures in, on and under the streets, avenues, public parks and places of such cities, towns or villages, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe." (Transportation Corporations Law, § 61, sub. 4, as added by L. 1899, chap. 565.)

3. Rights of water works corporations in highways.—a. Permit of local authorities; incorporation.—Seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided, the location of its principal office, the number of its directors, not less than seven, the names and places of residence of the directors for the first year, the name of the cities, towns and villages which it is proposed to supply with water; that the permit of the authorities of such cities, towns and villages herein required has been granted; the post-office address of each subscriber, and the number of shares he agrees to take in such corporation, the aggregate of which shall be at least one-tenth of the capital stock, and ten per centum of which shall be paid in cash to the directors. At the time of filing there shall be annexed to the certificate and as a part thereof, a permit, signed and acknowledged by a majority of the board of trustees of the village, in case an incorporated village is to be supplied with water, and in case a town, or any part thereof, not within an incorporated village, is to be so supplied, by the supervisor, justice of the peace, town clerk and highway commissioners thereof or a majority of them, and in case a city is to be supplied with water by the board of water commissioners of said city, or by such other board or set of officials as perform the duties of water commissioners and have charge of the water supply for said city, authorizing the formation of such corporation for the purpose of supplying such city, village or town with water, and an affidavit of at least three of the directors that the amount of capital stock herein required has been subscribed and paid in cash. (Transportation Corporations Law, § 80, as amended by L. 1892, chap. 617.)

b. Power to use highways.—A water works company has power:—

“1. To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public

place of any city, town or village in which it has obtained the permit required by section eighty of this article.

2. To lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained.

3. To cause such examinations and surveys for its proposed water-works to be made as may be necessary to determine the proper location thereof, and for such purpose by its officers, agents or servants to enter upon any lands or waters in the city, town or village where organized, or in any adjoining city, town or village for the purpose of making such examinations or surveys, subject to liability for all damages done." (Transportation Corporations Law, § 82. Amended by L. 1892, chap. 617.)

Water pipes in public highways.—The streets of a city or village are subject to use for the purpose of supplying water to the inhabitants, and the placing of pipes therein does not impose an additional burden on the fee if such streets can be regarded as urban streets. *Witcher v. Holland Water Works Co.*, 66 Hun. 619, 20 N. Y. Supp. 560, aff'd 142 N. Y. 626. Land in a thickly populated town, over which a public avenue is opened by legislative authority, may be used for all purposes necessary and usual to a public street in a populous place; and the owner is not entitled to additional compensation for the use of the land in laying water pipes by a company authorized by legislative authority so to act. *Crooke v. Flatbush Water Works Co.*, 29 Hun. 245. In the case of *Witcher v. Holland Water Works Co.*, *supra*, it was further held that a street in an unincorporated village is subject to use for the purpose of supplying water to the inhabitants of the village; and the use of such highways by a duly incorporated water works company does not impose an additional burden upon the fee of the street, although the water is not in actual use under any contract with the public authorities, but only by individual residents of the village who have contracted with the company. The rule as laid down in all cases is that the streets of a populous unincorporated village are to be deemed urban streets and not ordinary rural highways, in respect to the question of the easement which the necessities of the public may impose upon them. It is probable, however,

that the appropriation of a rural highway for the conveying of water to another town or village, the inhabitants along the line of the pipes not being entitled to the use of the water, is imposing an additional burden, for which the abutting owners may be entitled to compensation.

4. Construction of telegraph and telephone lines in highways.—A telegraph or telephone corporation “may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and upon, through or over any other land, subject to the right of the owners therof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the condemnation law.” (Transportation Corporations Law, § 102.)

Occupation of country highways by telegraph and telephone companies.—The rule is unquestionably settled in this state that the legislature cannot authorize a corporation to appropriate any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires, without the consent of the abutting owners, who own the fee of such highway, or unless the right to such highway for such purpose is acquired by condemnation proceedings. *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133. In discussing the rights of such companies in public highways the court said:—“Where land is dedicated or taken for a public purpose, the question is what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner and he retains the ownership of the land, subject only to the public easement. If this easement does not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant has no defence to the plaintiff’s claim. Although the purpose of a public highway

is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property, or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under it, but it cannot permanently appropriate any part of it."

There is a distinction in this respect between the streets in villages and cities, and rural public highways. In the case of a street in a thickly populated city or village the use thereof by a telegraph or telephone company may be shown to be within the limits of the public easement therein. See *Johnson v. N. Y. & Pa. Telephone & Telegraph Co.*, 76 App. Div. 564; *Castle v. Bell Telephone Co.*, 49 App. Div. 437.

An owner of land abutting on a public highway in a town who owns the fee to the center of the highway, may maintain an action in ejectment to compel the removal of telephone poles which a telephone company has erected therein, without obtaining the right so to do either by condemnation or by conveyance. *Myers v. Bell Telephone Co.*, 83 App. Div. 623. Among other cases holding that the construction and maintenance of a telegraph or telephone line within the limits of a public highway is an additional burden upon the fee, not included in the original dedication are the following:—*Blashfield v. Empire State Telephone & Telegraph Co.*, 71 Hun. 532; *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 67 How. Pr. 365; *Dusenbury v. Mutual Telegraph Co.*, 11 Abb. N. C. 440.

The owner of land abutting on a highway, who does not own any portion of the fee thereof, cannot compel the removal of poles erected in the highway by a telephone company, which do not cause any substantial damage to any easement of light, air or access which he has in the highway. *Halleran v. Bell Telephone Co.*, 64 App. Div. 41.

5. Laying pipes for heating purposes in highways.—A business corporation is authorized by L. 1879, chap. 317 to lay hot water, hot air and steam pipes in the highways of towns. Such act is as follows:

§ 1. "The municipal authorities of the cities, towns and villages of the State of New York are hereby authorized and empowered to carry out the provisions of this act.

§ 2. "Any corporation or association formed or organized under the act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed February seventeenth, eighteen hundred and forty-eight, or under any of the amendments to said act, or under the 'Act to provide for the organization and regulation of certain business corporations,' passed June twenty-first, eighteen hundred and seventy-five, shall have full power to manufacture, furnish, and sell such quantities of hot water, hot air, or steam as may be required in the city, town or village where the same shall be located; and such corporation shall have power to lay pipes or conductors for conducting hot water, hot air or steam through the streets, avenues, lanes, alleys, squares, and highways in such city, village or town, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations and conditions as they may prescribe; and whenever any such permission shall be granted it shall only be upon the condition that reasonable compensation shall be paid therefor, and upon a further condition that a satisfactory bond shall be given to secure the city, town or village against all damages in the use of said pipes. The amount of the compensation, and the manner of its payment, and the amount of the bond shall be first fixed and determined by said municipal authorities, before any pipes, as provided for by this act, shall be laid in any city, town, or village of this State, and that all such permissions heretofore given by any of said municipal authorities, where the above terms have been complied with, are hereby confirmed."

The acts referred to are L. 1848, chap. 40, and L. 1875, chap. 611.

CHAPTER VII.

Turnpikes, Plank-roads and Toll Bridges.

Transportation Corporations Law, Article IX.

Section 120. Incorporation.

121. Restriction upon location of road.
122. Agreement for use of highway.
123. Application to board of supervisors.
124. Commissioners to lay out road.
125. Possession of and title to real estate.
126. Use of turnpike road by plankroad.
127. Width and construction of road.
128. Construction of bridges; obstruction of rafts prohibited.
129. Certificate of completion of road or bridge.
130. Gates, rates of toll; and exemption.
131. Toll gatherers.
132. Penalty for running a gate.
133. Location of gates and change thereof.
134. Inspectors, their powers and duties.
135. Change of route, extensions and branches.
136. Milestones, guide-posts and hoist-gates.
137. Location of office of corporation.
138. Consolidation of corporations, sale of franchise.
139. Surrender of road.
140. Taxation and exemption.
141. Hauling logs and timber.
142. Encroachment of fences.
143. Penalty for fast driving over bridges.
144. Acts of directors prohibited.
145. Actions for penalties.
146. Proof of incorporation.
147. When stockholders, to be directors.
148. Dissolution of corporation, road to be a highway.
149. Town must pay for lands not originally a highway.
150. Highway labor upon line of plank-road or turnpike.
151. Extension of corporate existence.

§ 120. **Incorporation.**—Five or more persons may become a corporation for the purpose of constructing, maintaining, and owning a turnpike, plank-road or a bridge, or causeway across any stream or channel of water, or adjoining bay, swamp, marsh, or water to form in connection with such bridge or causeway a continuous roadway across the same, by signing, acknowledging and filing a certificate containing the name of the corporation, its duration, not exceeding fifty years, the amount and number of shares of its capital stock, the number of its directors, and their names and the post-office address for the first year, the termini of the proposed road, its length, and each town, city or village into or through which it is to pass, or of a bridge,

the location and plan thereof, and the post-office address of each subscriber, and the number of shares of stock which he agrees to take, the aggregate of which subscriptions shall not be less than five hundred dollars for every mile of road, or if a bridge corporation not less than one-fourth of the amount of the capital stock, and five per cent of which must be actually paid in cash. There shall be indorsed on and annexed to the certificate and made a part thereof the affidavit of at least three of the directors named therein, that the required amount of capital stock has been subscribed and the prescribed percentage paid in cash.

This article of the Transportation Corporations Law does not apply to a turnpike, plank road, or bridge corporation not organized under a general law. It has no application to such a corporation organized under a special act. *Aurora & Buffalo Plank Road Co. v. Schrot*, 90 Hun 56; see also *Monticello & Fallsburgh Turnpike Co. v. Leroy*, 72 App. Div. 241.

§ 121. Restrictions upon location of road.—No such road shall be laid out through any orchard of the growth of four years or more to the injury or destruction of fruit trees, or through any garden cultivated for four years or more before the laying out of the road, or through any dwelling-house or building connected therewith, or any yards or inclosures necessary for its use or enjoyment without the consent of the owner thereof, nor shall any such corporation bridge any stream in any manner that will prevent or endanger the passage of any raft of twenty-five feet in width, or where the same is navigable by vessels or steamboats.

§ 122. Agreement for use of highways.—The supervisor and commissioner of highways, or a majority if there be more than one of any town, may agree in writing with any such corporation for the use of any part of a public highway therein required for the construction of any such road, and the compensation to be paid by the corporation for taking and using such highway for such purpose on first obtaining consent of at least two-thirds of all the owners of land bounded on or along such highway, which agreement shall be filed and recorded in the town clerk's office of the town. If such agreement can not be made the corporation may acquire the right to take such high-

way for such purpose by condemnation. The compensation therefor shall be paid to the commissioners of highways, to be expended by them in improving the highways of the town.

Powers of town officers.—The supervisor and commissioner of highways may contract with a plank road or turnpike company as to its taking or using a highway of the town for the construction of its road. They may agree with the company upon the compensation and damages to be paid for taking and using the highway, and may grant the right to do so. But they cannot grant this right on condition that it shall erect and maintain its toll-gates in specified localities. Nor can they grant such right, and as a consideration therefor, obligate the company not to locate and maintain a toll-gate within a specified limit. *Palmer v. Ft. Plain and Cooperstown Plank Road Co.*, 11 N. Y. 276.

Grant of land to company.—A corporation organized under this article is authorized to take by purchase the entire fee of lands needed for its road, and no condition or qualification of the grant will be implied in an absolute conveyance to it in fee. The grantor retains no property therein which will prevent a division of the property among the stockholders, or which will preclude the public from entering upon such lands for the purpose of a highway upon the abandonment of its road by the company. *Heath v. Barmore*, 50 N. Y. 302.

Road does not cease to be public highway.—Where a plank road company takes and uses a public highway for its purposes, the road thus appropriated does not cease to be a public highway. The general right of the public to use it for the purpose of travel, with horses, carriages and on foot, remains unimpaired. The change effected by the law is that the general public, in consideration of the payment of certain tolls, is relieved from the burden of keeping the highway in repair, and the duties which, in this respect, before belonged to the commissioners of highways and other local officers, is transferred to the company. *Walker v. Caywood*, 31 N. Y. 51.

Although a turnpike corporation has acquired a right to the use and control of a town highway for its purposes, there still remains in the highway commissioners a general control over it as a highway, and they have a duty to perform towards the public in connection with its proper maintenance as such. A turnpike company cannot, therefore, consent to the construction of an electric railway within the highway without the consent of the highway commissioners and the abutting owners as required by the general Railroad Law. *Matter of Application of Rochester Electric Ry. Co.*, 123 N. Y. 351.

§ 123. Application to board of supervisors.—If the lands necessary for the construction of the road or bridge of any such corporation in any county have not been procured by gift or purchase, and the right to take and use any part of any highway therein required by such corporation shall not have been procured by agreement with the supervisor and commissioners of highways of the town in which such highway is situated, the corporation may make application to the board of supervisors of each county in which such bridge or road, or any part thereof, is to be located, for authority to build, lay out and

construct the same, and take the necessary real estate for such purpose. Notice of the application shall be published in at least one public newspaper in each county for six successive weeks, specifying the time and place where it will be made, the location, length and breadth of any such bridge, and the length and route of any such proposed road, its character, and each town, city and village in or through which it is to be constructed. The application may be made at any annual or special meeting of the board, and if the corporation desires, a special meeting therefor any three members of the board may fix a time when the same shall be held, and notice thereof shall be served upon each of the other supervisors by delivering the same to him personally or leaving it at his place of residence at least twenty days before the meeting, and the expenses of the special meeting and of notifying the members of the board thereof shall be paid by the corporation. All persons interested therein or owning real estate in any of the towns through which it is proposed to construct the road may appear and be heard upon the hearing of the application. The board may take testimony in respect thereto or authorize it to be taken by a committee of the board, and may adjourn the hearing from time to time. After hearing the application the board may, by an order entered in its minutes, authorize the corporation to construct such bridge or road and to take the real estate necessary for that purpose, and a copy of the order certified by the clerk of the board shall be recorded by the corporation in the office of the clerk of the county in which such bridge or road or any part thereof is to be located before any act shall be done under it.

§ 124. Commissioners to lay out road.—If the application for the construction of any such road is granted, the board shall appoint three disinterested persons, not owners of real estate in any town, through which the road is to be constructed or in any adjoining town, commissioners to lay out the road. They shall take the constitutional oath of office, and without unnecessary delay lay out the route of such road in such manner as in their opinion will best promote the public interests; they shall hear all persons interested who shall apply to be heard

and may take testimony in relation thereto, and shall cause an accurate survey and description of the road and the necessary buildings and gates, signed and acknowledged by them to be recorded in the clerk's office of the county. If the road is situated in more than one county, such survey and description shall be separate as to that portion in each county and filed in the office of the clerk of the county in which it relates. The corporation shall pay each commissioner three dollars for every day spent by him in the performance of his duties and his necessary expenses.

§ 125. Possession of and title to real estate.—The route so laid out and surveyed by the commissioners shall be the route of the road, and the corporation may enter upon, take and hold for the purposes of its incorporation, the lands described in such survey as necessary for the construction of its road, and requisite buildings and gates. If for any cause the owner of any of such lands shall be incapable of selling the same or his name or residence can not, with reasonable diligence be ascertained, or the corporation is unable to agree with the owner for the purchase thereof, it may acquire title thereto by condemnation.

§ 126. Use of turnpike road by plank-road.—No plank-road shall be made on the roadway of any turnpike corporation without its consent, except for the purpose of crossing the same. Any plank-road corporation may contract with any connecting turnpike corporation for the purchase of its roadway or a part thereof, or of its stock, on such terms as may be mutually agreed upon, and such stock, if purchased, shall be held by the plank-road corporation for the benefit of its stockholders in proportion to the amount of stock held by each, and a transfer of stock in the plank-road corporation shall carry with it its proportional amount of the turnpike stock, and entitle the holder thereof to his share of the dividends derived therefrom. After the purchase of the whole of the stock of any such turnpike corporation by such plank-road corporation the directors of the plank-road corporation shall be the directors of the turnpike corporation, and shall manage its affairs and render an

account of the same annually to the stockholders of the plank-road corporation. If the plank-road corporation is dissolved, its stockholders at the time of dissolution shall be the stockholders of the turnpike corporation in proportion to the amount of stock held by each, and the stock of the turnpike corporation shall thereafter be deemed to be divided into shares equal in number to the shares of stock of the late plank-road corporation, and scrip therefor shall be issued accordingly to each of the last stockholders of the plank-road corporation, and the officers of the turnpike corporation shall be the same in number as provided for in its charter or certificate of incorporation, and shall be chosen by such former stockholders of the plank-road corporation or their assigns. A corporation owning a turnpike road on or adjoining which a plank-road shall have been constructed may abandon that portion of its road on or adjoining the route of which a plank-road is actually constructed and used.

§ 127. Width and construction of road.—Every such plank-road shall be so constructed as to make, secure and maintain a smooth and permanent road, the track of which shall be made of timber, plank or other hard material forming a hard and even surface, and every such turnpike road shall be bedded with stone, gravel or such other material as may be found on the line thereof, and faced with broken stone or gravel, forming a hard and even surface with good and sufficient ditches on each side wherever practicable, and all such roads shall be laid out at least four rods wide and the arch or bed at least eighteen feet wide, and shall be so constructed as to permit carriages and other vehicles conveniently to pass each other, and to pass on and off such road where intersected with other roads. Any corporation which shall have once laid its road with plank may relay the same, or any part thereof, with broken stone, gravel, shells or other hard materials, forming a good and substantial road. Any plank-road or turnpike corporation may lay iron rails on its road suitable for the use of wagons and vehicles drawn by horses or animals over its road, but no other motive power shall be used thereon.

§ 128. Construction of bridges; obstruction of rafts prohibited.

—Every bridge constructed by any such corporation shall be built with a good and substantial railing or siding at least four and one-half feet high, and over any stream navigable by rafts the corporation shall keep the channel of the stream above and below the bridge free and clear from all deposits, formed or occasioned by the erection of the bridge, which shall in any wise obstruct the navigation thereof, and shall be liable to all persons unreasonably or unnecessarily delayed or hindered in passing the same for all damages sustained thereby. Nothing in this act shall be construed to authorize the bridging of any river or water-course where the tide ebbs and flows, or any waters over which the federal authorities have any control, unless the consent of such federal authorities be first obtained; nor the construction of any bridge within the limits prescribed by any existing law for the erection or maintenance of any other bridge. (Amended by L. 1895, chap. 722; L. 1896, chap. 778.)

§ 129. Certificate of completion of road or bridge.—When any such corporation shall have completed its bridge or road or any five consecutive miles thereof, it may apply to the commissioners of highways of each town in which the completed road or bridge is situated to inspect the same, and if a majority of the commissioners are satisfied that the road or bridge is made and completed as required by law and in a manner safe and convenient for the public use, they shall make a certificate to that effect, which shall be filed in the office of the county clerk. Each commissioner shall be paid by the corporation two dollars per day for his services and necessary expenses.

§ 130. Gates, rates of toll; and exemption.—Upon filing such certificate such corporation may erect a toll-gate at such bridge or one or more toll-gates upon the road so inspected, and may demand and receive the following rates of toll, a printed list of which shall be conspicuously posted at or over each gate. If a bridge corporation, such sum as shall be from time to time prescribed by the board of supervisors of the county or counties in which the bridge is located. If a turn-pike or plank

road, for every vehicle drawn by one animal, one cent per mile, and one cent per mile for each additional animal; for every vehicle used chiefly for carrying passengers, three cents per mile, and one cent per mile for each additional animal; for every horse, rode, led or driven, three-quarters of a cent per mile; for every score of sheep or swine, one and one-half cents per mile, and for every score of neat cattle, two cents per mile. When diverging roads strike any plank-road or turnpike at or near any toll-gate, the board of supervisors of the county may direct that the toll charge shall commence from the point of such divergence, and only for the distance traveled on such turnpike or plank-road, but fractions of cents may be made units of cents in favor of the plank-road or turnpike corporation. The corporation may from time to time commute, but not for a longer period than one year at any one time, with any person whose place of abode shall adjoin or be near to the road for the toll payable at the nearest gate on each side thereof, and the commutation may be renewed from year to year. No tolls shall be charged or collected at any gate, from any person going to or from public worship, a funeral, school, town meeting or election at which he is a voter to cast his vote, a military parade which he is required by law to attend, any court which he shall be required to attend as a juror or witness, nor when going to or from his required work upon any public highway, nor when transporting troops in the actual service of the United States; and no toll from persons living within one-half mile of the gate by the most usual traveled road when not engaged in the transportation of other persons or property except that persons living within one mile of the gate, by the most usually traveled road, in an incorporated village of over six thousand inhabitants, when not engaged in the transportation of the persons or property shall be exempt from the payment of toll. (Amended by L. 1893, chap. 538.)

The board of supervisors may establish the rates of toll for crossing a public bridge erected by a bridge corporation, County Law, § 62, ante p. Such boards have the power by a vote of two-thirds of its members to change the rates of toll charged or received by a turnpike or plank road company. County Law, § 73, ante p.

Application of section. The provision of the above section that no toll shall be collected at any gate from a person living within one-half

a mile of the gate, only applies to corporations organized under the general law, and does not apply to a turnpike company incorporated under a special charter. *Great Western Turnpike Co. v. Shafer*, 57 App. Div. 331, aff'd 172 N. Y. 662; *Aurora & Buffalo Plank Road Co. v. Schrot*, 90 Hun. 56.

Exemptions.—Persons going to or from public worship are exempt, whether for the purpose of conducting or uniting in the exercises of devotion. *Skinner v. Anderson*, 12 Barb. 648. Where a person claims exemption from the payment of toll on the ground that he lives within one-half a mile of the gate by the most usually traveled road, he must establish not only such fact, but also that at the time the toll was exacted he was not, "engaged in the transportation of other persons or property." *Conly v. Clay*, 90 Hun. 20. Where a person, assuming to act on behalf of a turnpike company makes an oral agreement with the life-tenant of a farm within half a mile of the toll-gate, that if such tenant will close up a private road which diminishes the travel over the turnpike, the occupants of the farm shall be forever relieved from liability to pay tolls, the turnpike company cannot, after recognizing the agreement for forty years, question the authority of the person who made the agreement on its behalf. *Great Western Turnpike Co. v. Shafer*, 57 App. Div. 331, aff'd 172 N. Y. 662.

§ 131. Toll gatherers.—Every such corporation may appoint toll gatherers to collect toll at each gate, who may detain and prevent from passing through the gate, any person riding, leading or driving animals or vehicles, subject to the payment of toll, until the toll is paid, but if he shall unreasonably hinder or delay any traveler or passenger liable to the payment of toll, or shall demand or receive from any person more toll than he is authorized by law to collect, he shall forfeit to such person the sum of five dollars for every offense, and the corporation employing him shall be liable for the payment thereof, and for any damages sustained by any person for acts done or omitted to be done by him in his capacity of toll gatherer, if on recovery of judgment against the toll gatherer therefor, execution thereon shall be returned nulla bona.

§ 132. Penalty for running a gate.—Any person who, with intent to avoid the payment of toll, shall pass any gate, without paying the toll required by law, or shall, with his team, carriage or horse turn out of a turnpike or plank-road and pass any gate thereon on ground adjacent thereto, shall forfeit for each offense the sum of ten dollars to the corporation injured.

§ 133. Location of gates and change thereof.—No such corporation shall erect any toll gate, house, or other building within ten rods of the front of any dwelling house, barn or other

out house, without the written consent of the owner, and the county judge of the county in which the same is located shall, on application, order any building so erected to be removed, and if a majority of the commissioners of highways of any town, in which a toll-gate shall be located, or in an adjoining town, shall deem the location of any gate unjust to the public interests by reason of the proximity of diverging roads or otherwise, they may, on fifteen days' written notice to the president or secretary of the corporation, apply to the county court of the county in which the gate is located, for an order to alter or change its location. On hearing such application, and viewing the premises, if deemed necessary, the court may make such order in the matter as may be just and proper. Either party may, within fifteen days thereafter, appeal to the general term of the supreme court from such order, on giving such security as the county judge, making the order, may prescribe. Upon such appeal the supreme court, on motion of either party and on due notice, shall appoint three disinterested persons who are not residents of any town through or into which such road shall run, or to or from which it is the principal thoroughfare, or any adjoining town, as referees to hear, try and determine the appeal. Such referees shall view the premises and the location of the gate, and hear the parties in the same manner as on the trial of an issue of fact by a referee in a civil action in the supreme court, and report their decision thereon and the reasons therefor, and the evidence taken thereon to the supreme court, and such court shall review the report and render judgment thereon as justice and equity shall require, which shall be final and conclusive. The referees shall be entitled to the same fees as referees in civil actions in the supreme court, to be paid in the first instance by the party in whose favor their report or decision shall be, and the supreme court shall award judgment therefor, with such costs and expenses as it may deem reasonable, to the successful party on the appeal, which judgment shall be entered with the order affirming or reversing the order appealed from, and may be enforced by execution as a judgment of a court of record. If the order of the county court is not appealed from, it may be enforced, as the court

may direct, and the court may allow such costs as may be deemed just and equitable.

§ 134. Inspectors; their powers and duties.—The commissioners of highways of the several towns and the trustees or other officers in the incorporated cities and villages of the state, who perform the duties of commissioners of highways in such cities and villages, shall be inspectors of plank-roads and turnpikes, in their respective towns, cities and villages. They shall inspect or cause to be inspected by one or more of them the whole of such turnpike or plank-roads as lies in their respective towns, villages or cities, at least once in each month, and whenever written complaint shall be made to any inspector, that any part of such road lying in the town, city or village of such inspector is out of repair he shall, without delay, view and examine the part complained of. If such turnpike or plank-road shall be found to be out of repair or in condition not to be conveniently used by the public, such inspectors or either of them, or the one to whom such complaint shall have been made, shall give written notice to the toll-gatherer, or person attending the gate nearest the place out of repair or in bad condition to cause the same to be put in good condition before a time therein designated not less than forty-eight hours after the service of such notice, or to appear before the county court of the county in which that part of the road is situated, at a time in said notice designated, and show cause why such turnpike or plank-road should not be repaired or put in good condition as in said notice directed. If such road shall not have been theretofore repaired or put in good condition as in said notice directed, then the county court shall, upon the return of such notice, hear the allegations and proofs of the parties, and it shall always be open for that purpose; and if the court shall find such road to be out of repair or in bad condition it may give additional time for the repair thereof, or it may order the gate nearest the place out of repair or in bad condition to be immediately upon the service of the order, or at a time therein specified, thrown open and to remain open until the road shall be fully repaired at the place directed to be repaired as aforesaid. Such order

shall be served in the manner therein specified upon the keeper of the gate so ordered to be thrown open. Any inspector within the town, city or village where such road has been repaired pursuant to notice or order as aforesaid, may certify that such road has been duly repaired. The fees of the inspector for the services above mentioned shall be two dollars for each day actually employed, together with necessary witnesses' fees, to be paid by the corporation or person whose road is so inspected, if the gates are ordered to be thrown open, but otherwise to be charged, audited and paid in the same manner as other fees of commissioners of highways. Any inspector who neglects to perform his duties shall forfeit to the party aggrieved the sum of twenty-five dollars for each offense. Every keeper of a gate ordered to be thrown open, not immediately obeying such order or not keeping such gate open until such road shall be fully repaired or until a certificate that such road has been duly repaired is granted, or hindering or delaying any person in passing, or taking any tolls from any person passing such gate during the time it ought to be open, shall forfeit to the party aggrieved the sum of ten dollars for each offense, and the corporation or person owning the road, who shall refuse or neglect to obey the requirements of any such order shall forfeit to the people of the state the sum of two hundred dollars for each offense. (Amended by L. 1896, chap. 343.)

§ 135. Change of route; extension and branches.—Any such corporation may, with the written consent of the owners of two-thirds of its capital stock and of a majority of the commissioners of highways of the town or towns, in which any change or extension is proposed to be made, construct branches to its main line or extend the same, or change the route of its road or any part thereof, and acquire the right of way for the same in the same manner as for the original or main line, and may, by any of its officers, agents or servants, enter upon lands for the purpose of making any examination, survey or map, doing no unnecessary damage; but before entering upon, taking or using such lands, the corporation shall make a survey and map thereof, designating thereon the lands of each owner or occu-

pant intended to be taken or used, which shall be signed and acknowledged by the engineer making the same and the president of the corporation and filed in the office of the clerk of the county in which the land is situated.

§ 136. Mile-stones; guide-posts and hoist-gates.—A mile-stone or post shall be erected and maintained by every such corporation on each mile of its road, on which shall be fairly and legibly marked or inscribed the distance of such stone or post from the place of commencement of the road, and when the road shall commence at the end of any other road having mile-stones or posts on which the distance from any city or town is marked, a continuation of that distance shall in like manner be inscribed. A guide-post shall also be erected at the intersection of every public road leading into or from every turnpike or plank-road, on which shall be inscribed the name of the place to which such intersecting road leads in the direction to which the name on the guide post shall point. No plank-road or turnpike corporation shall erect or put up any hoist-gate on its road. Any person who shall willfully break, cut down, deface or injure any mile-stone, post or gate on such road, or dig up, or injure any part of the road, or anything belonging thereto, shall forfeit to the corporation twenty-five dollars for every offense, in addition to the damages resulting from the act.

Injury to highway and mile-boards.—Penal Code, § 638, subs. 1 and 6, provide that a person who willfully or maliciously displaces, removes, injures or destroys a public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way, or a mile-board, mile-stone, or guide-post, erected upon a highway, or any inscription upon the same, is punishable by imprisonment for not more than two years.

Where a turnpike or plank road is abandoned, the road reverts to the town and the town may compel its surrender and restoration to its original width and condition. *Town of Palatine v. N. Y. C. & H. R. R. Co.*, 22 App. Div. 181. A surrender of the road by the company is equivalent to an alienation, and embraces not only the lands which were public highways when acquired by the company, but also lands which never before belonged to the town. *Heath v. Barrmore*, 50 N. Y. 302.

It is the policy of the state, as indicated by the above section and other legislation on the subject, that public roads, constructed by turnpike or other corporations under special charters or general statute, shall, on dissolution of the companies, which constructed them, or their abandonment by such companies, become and be thereafter treated as public highways. *People ex rel Keene v. Supervisors*, 151 N. Y. 190.

§ 137. Location of office of corporation.—Within two weeks after the formation of any such corporation its directors shall designate some place within a county in which its road or bridge, or some part thereof shall be constructed as its office; and shall give public notice thereof by publishing the same once in each week for three successive weeks in a public newspaper in the county, and shall file a copy of the notice in the office of the county clerk of every county in which any part of the road or bridge is, or is to be constructed, and if the location of such office shall be changed, like notice of the change shall be published and filed, in which shall be specified the time of making the change, before it shall take effect. Every notice, summons or other paper required by law to be served on the corporation may be served by leaving the same at such office with any person having charge thereof, at any time between nine o'clock in the forenoon and five o'clock in the afternoon of any day except Sunday or a legal holiday.

§ 138. Consolidation of corporations and sale of franchise.—Any two or more of such corporations may consolidate into one corporation on such terms as the persons owning two-thirds of the stock of each corporation may agree upon, and may change the name of the road on filing in the office where the original certificates of incorporation were filed, a certificate containing the names of the roads so consolidated, and the name by which such road shall thereafter be known. Any plank-road or turnpike corporation may, with the consent of the owners of sixty per cent of its stock, sell, and convey the whole or any part of its rights, property and franchises to any other domestic plank-road or turnpike corporation, and such sale and conveyance shall vest the rights, property and franchises thereby transferred in the corporation to which they are conveyed for the term of its corporate existence.

§ 139. Surrender of road.—The directors of any plank-road or turnpike corporation may abandon the whole or any part of its road at either or both ends thereof, upon obtaining the written consent of the stockholders, owning two-thirds of the stock of the corporation, which surrender shall be by a declara-

tion in writing to that effect, attested by the seal of the corporation and acknowledged by the president and secretary. Such declaration and consent shall be filed and recorded in the clerk's office of the county in which any part of the road abandoned shall be situated, and the road so abandoned shall cease to be the road or the property of the corporation, and shall revert and belong to the several towns, cities and villages through which it was constructed, and the corporation shall no longer be liable to maintain it or to be assessed thereon, or permitted to collect tolls for traveling over the same, but without impairing its right to take toll on the remaining part of its road at the rate prescribed by law. And whenever any turnpike or plank-road company, now existing or hereafter created, shall abandon all or any part of its road within this state, in the manner above provided, or whenever its charter or franchise of such company shall be annulled or revoked, the road of such turnpike or plank-road company shall revert to and belong to the several towns, cities and villages through which such road shall pass. And it shall be the duty of the several towns, cities and villages acquiring any road under this act to immediately lay out and declare the same a free public highway. And it shall be the duty of the several towns, cities and villages, to maintain and work every road acquired under the provisions of this act in the same manner as the other roads of such towns, cities and villages are maintained and worked. And any town, city or village may borrow money in the manner provided by law for the purpose of improving or repairing the same. (Amended by L. 1896, chap. 964.)

§ 140. Taxation and exemption.—So much of any bridge or toll-house of any bridge corporation as may be within any town, city or village, shall be liable to taxation therein as real estate. Toll-houses and other fixtures and all property belonging to any plank-road or turnpike corporation shall be exempt from assessment and taxation for any purpose until the surplus annual receipts of tolls on its road over necessary repairs and a suitable reserve fund for repairs or relaying of plank, shall exceed seven per cent per annum on the first cost of the road.

If the assessors of any town, village or city and the corporation disagree concerning any exemption claim, the corporation may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to both parties, examine the books and vouchers of the corporation, and take such further proof as he shall deem proper, and decide whether such corporation is liable to taxation under this section, and his decision shall be final.

§ 141. Hauling logs and timber.—Any person who shall draw or haul or cause to be drawn or hauled, any logs, timber or other material upon the bed of any plank or turnpike road, unless the same shall be entirely elevated above the surface of the road on wheels or runners, and the road-bed shall be injured thereby, or who shall do or cause to be done any act by which the road-bed, or any ditch, sluice, culvert or drain appertaining to any turnpike or plank-road shall be injured or obstructed, or shall divert or cause to be diverted, any stream of water so as to injure or endanger any part of such road, shall forfeit to the corporation the sum of five dollars for every offense in addition to the damages resulting from the wrongful act.

§ 142. Encroachment of fences.—Whenever the president or secretary of any turnpike or plank-road corporation shall notify any inspector of such roads in the county where situated that any person is erecting or has erected any fence or other structure upon any part of the premises lawfully set apart for any such turnpike or plank-road, the inspector shall examine into the facts and order the fence or other structure to be removed if it shall appear to be upon any part of any such road, and any person neglecting or refusing to remove the same within twenty days or such further time not exceeding three months, as may be fixed by the inspector, shall forfeit to the corporation the sum of five dollars for every day during which the fence or other structure shall remain upon such road, but no such order shall require the removal of any fence, previously erected, between the first day of December and the first day of April.

§ 143. Penalty for fast driving over bridges.—Any plank-road, turnpike or bridge corporation may put up and maintain

at conspicuous places at each end of any bridge, owned or maintained by it, the length of whose span is not less than twenty-five feet, a notice with the following words in large characters: "One dollar fine for riding or driving over this bridge faster than a walk." Whoever shall ride or drive faster than a walk, over any bridge, upon which such notice shall have been placed, and shall then be, shall forfeit to the corporation the sum of one dollar for every such offense.

§ 144. Acts of directors prohibited.—No director of any such corporation shall be concerned, directly or indirectly, in any contract for making or working any road belonging to it during the time he shall be a director. No contractor, for the making of such road or any part thereof, shall make a new contract for the performance of his work, or any part of it, other than by hiring hands, teams, carriages or utensils to be superintended and paid by himself, unless such new contract and its terms be laid before the board of directors and be approved by them.

§ 145. Actions for penalties.—No action to recover any penalty against any turnpike or plank-road corporation, shall be commenced or maintained against it, or any of its officers or agents, unless commenced within thirty days after the penalty was incurred.

§ 146. Proof of incorporation.—In any action brought by or against any domestic turnpike or plank-road corporation, which shall have been in actual operation, and in possession of a road upon which it has taken toll for five consecutive years, next preceding the commencement of the action, parol proof of such corporate existence and use shall be sufficient to establish the incorporation of the corporation, for all the purposes of the action, unless the opposing party shall set up a claim in his complaint or answer duly verified of title in himself to the road, or some part therof stating the nature of his title, and right to the immediate possession and use thereof.

§ 147. When stockholders to be directors.—When the whole number of stockholders in any turnpike or plank-road corporation shall not exceed the number of directors specified in the

certificate of incorporation, each stockholder shall be a director of such corporation, and the stockholders shall constitute the board of directors, whatever may be their number, and a majority thereof shall be a quorum for the transaction of business.

§ 148. Dissolution of corporation.—Every turnpike, plank-road or bridge corporation may be dissolved by the legislature when, by the income arising from tolls, it shall have been compensated for all moneys expended in purchasing, making, repairing and taking care of its road, and have received in addition thereto an average annual interest at the rate of ten per cent, and on such dissolution all the rights and property of the corporation shall vest in the people of the state. Any such corporation which shall not within two years from the filing of its certificate of incorporation, have commenced the construction of its road or bridge and actually expended thereon ten per cent of its capital, or which shall not within five years from such filing have completed its road or bridge, or, in case such bridge is destroyed, shall not rebuild the same within five years, or which, for a period of five consecutive years shall have neglected or omitted to exercise its corporate functions shall be deemed dissolved. Where the corporation has neglected or omitted for five years to excise its corporate functions, and its road-bed or right of way shall have been used as a public highway for that period, or where any such corporation shall have become dissolved, or where the road or any part of it of a turnpike or plank-road corporation, or the bridge of any bridge corporation, shall have been discontinued, such road-bed or right of way, and such discontinued road or bridge, and the road or bridge of any such dissolved corporation, shall thereafter be a public highway, with the same effect as if laid out by the commissioners of highways of the town, and be subject to the laws relating to highways and the erection, repairing and preservation of bridges thereon.

§ 149. Towns must pay for lands not originally a highway.—When the corporate existence of any plank-road or turnpike corporation shall have ceased by limitation of time, or where any judgment of ouster or dissolution, or restraining the exer-

cise of its franchise has been rendered in any action against it, such portion of the line of its road as was built over lands which were originally purchased by it and not previously a public highway shall not be used as a public highway, nor be taken possession or control of by the town in which the same may be, or by any of the authorities thereof or be claimed or worked or used as a public highway until the town shall pay over to the treasurer, receiver or other legal representative of the corporation, or its assigns, the principal sum of the amounts paid by it for such lands, as shown by the deeds of conveyance thereof to it, and every such judgment shall provide accordingly. Such payments shall be made within three months after the expiration of the corporate existence of the corporation, or if any such judgment has been or shall be rendered within three months after service of written notice of the entry thereof on the supervisor of the town, and the person receiving such payment shall execute a proper discharge therefor and a conveyance to the town of all the title and interest which the corporation had in such lands at the expiration of its corporate existence.

§ 150. Highway labor upon line of plank-road or turnpike.— Every person liable for highway labor living or owning property on the line of any plank-road or turnpike may, on written application to the commissioners of highways of the town, on any day previous to making out the highway warrant by the commissioners, be assessed for the highway labor upon his property upon the line of such road, in the discretion of the commissioners to be worked out upon the line of such road as a separate road district, and the commissioners shall make a separate list of the persons and property so assessed, as for a separate road district, and deliver the same to one of the directors of the corporation owning such road, who shall cause such highway labor to be worked out on such road in the same manner that overseers of highways are required to do, and such directors shall possess the powers and have the authority to compel the performance of such highway labor or the payment of the tax therefor as such overseers now have by law, and shall

make like returns to the commissioner of highways, and any person so assessed may commute for the highway labor assessed upon him or his property by paying the sum now fixed by law as the commutation for such highway labor.

§ 151. Extension of corporate existence.—No turnpike, plank-road or bridge corporation shall extend its corporate existence, pursuant to the provisions of the general corporation law, without the written consent of the persons owning at least two-thirds of its capital stock, nor without the consent of the board of supervisors of each county in which any part of its road or bridge is situated, which consent shall be given by a resolution of the board adopted at any regular or special meeting, and a copy of such resolution, certified by the clerk of the board, or verified by the affidavit of some member thereof, together with such consent of the stockholders, and a statement verified by the affidavit of the president and treasurer of the corporation, showing the actual capital expended upon the construction of the road, exclusive of repairs, the name of each town or ward through or into which the road passes, and, if any part of the road shall have been abandoned, the actual cost of the remaining part, exclusive of repairs, shall be filed with the certificate of the continuance of the corporate existence. No further abandonment of any road belonging to a corporation whose corporate existence has been so extended shall be made, except with the consent of a majority of the board of supervisors of the county in which the abandoned portion of the road may lie, which consent shall be filed in the office of the clerk of the county.

2. Abatement of toll for watering troughs.—L. 1869, ch. 131, §§ 2 and 3, as added by L. 1872, chap. 274, authorize an abatement of toll for the construction and maintenance of watering troughs. Such sections are as follows:

§ 2. The directors of the several plank-road and turnpike road companies in this state shall annually abate three dollars from the toll of any inhabitant, not an innkeeper, or all of it if in the aggregate not exceeding that sum, who shall construct on his own land, and keep in repair, a watering trough beside the plank-road or turnpike road as the case may be, well supplied with fresh water, the surface of which shall be two or

more feet above the level of the ground, and easily accessible for horses with vehicles; but the commissioners of highways of the towns respectively shall, and they are hereby invested with full power and authority to designate those necessary for the public convenience along said plank-road or turnpike road, as the case may be, and no others than those designated shall be allowed both such abatement of toll and highway labor.

§ 3. In case the directors of any plank-road or turnpike road company in this state, shall refuse or neglect to abate the toll as aforesaid, in compliance with the provisions of the preceding section, any inhabitant having constructed a watering trough in compliance therewith, may notify the commissioner or commissioners of highways, as the case may be, of the town in which the same had been erected, of such neglect or refusal on the part of the directors aforesaid, whose duty it shall be, and who are hereby invested with full power and authority to proceed, without delay, to an examination of said watering trough: and if, upon a full examination of the same, the said commissioner or commissioners, as the case may be, or a majority of them, shall deem it necessary for the convenience of the public that such watering trough ought to be maintained, he or they, as the case may be, shall forthwith notify the said directors accordingly, by serving a written notice on the president of the company, to that effect, in which the necessity of its maintenance shall be clearly expressed; and if the said directors shall still refuse or neglect to abate the toll as aforesaid, and shall demand and take toll, on application for such abatement, in violation of the provisions of the preceding section, for the space of thirty days after the service of such notice, they shall be liable to a penalty of twenty dollars, to be recovered in an action at law, at the suit of the person having constructed said watering trough.

3. Acquisition of turnpikes, plank roads and toll bridges by boards of supervisors.—L. 1899, ch. 594, authorizes the acquisition of the property of corporations and individuals owning toll roads and bridges. Such act, as amended, reads as follows:

§ 1. The board of supervisors of any county, except a county wholly within the city of New York, and except the counties

of Onondaga, Erie and Essex, may by a vote of a majority of the members thereof, by resolution, determine to acquire the rights and franchises of any individual corporation, lawfully entitled to exact a toll or charge for walking, riding or driving over any plank-road or turnpike, or a bridge within such county, erected over an unnavigable stream. Upon the adoption of such resolution, the board of supervisors shall acquire such rights, franchises and property by purchase, if able to agree with the owners thereof, and otherwise by condemnation in the name of the county. Any turnpike, plank-road or bridge corporation may, by the affirmative vote of stockholders owning a majority of the stock thereof, expressed in writing or at a special meeting of the stockholders of such corporation held upon written notice of at least ten days to all the stockholders thereof, authorize its board of directors or trustees, to dispose of the rights, franchises and property of such corporation within a county, pursuant to this act for a specified sum; and thereupon the board of directors or trustees of such corporation may convey and sell such rights, franchises and property to the county accordingly.

§ 2. The board of supervisors of such county may borrow money for the acquisition of such rights, franchises and property, and may issue the bonds or other evidences of indebtedness of the county therefor, but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum and shall not run for a longer period than twenty years and shall not be sold for less than par.

§ 3. Except in the counties of Rensselaer, Albany and Columbia, the amount of such bonds in whole or in part together with the interest thereon may be apportioned by the boards of supervisors upon the towns, cities and villages constituting separate highway districts, in which such plank road, turnpike or bridge is located, in such proportions as the boards may deem just and the amount so apportioned to each municipality for the payment of the principal and interest of such bonds shall be annually levied and collected at the same time and in the same manner as money for other county charges.

In the counties of Rensselaer and Columbia the boards of supervisors, in making up the annual tax budget of the counties, shall each year levy and assess upon and against the taxable property in said counties, in addition to the amounts levied and assessed for other county charges, an amount sufficient to pay the interest falling due and payable on the said bonds during such year, and also an amount sufficient to pay the proportion of the principal of said bonds which one year bears to the number of years fixed at the time during which said bonds shall run from their issue to maturity. The amount raised by tax in each year for the payment of the principal of said bonds shall be preserved intact by the county treasurers of said counties until said bonds mature and are payable, and, upon the maturity of said bonds, said county treasurers shall pay the same in full out of the moneys so raised by annual tax therefor and shall thereupon take back said bonds with receipt for the payment thereof and deliver them to the boards of supervisors of said counties for cancellation. Said county treasurers shall deposit at interest the said moneys yearly raised by tax for payment of the principal of said bonds in such bank or depository as shall be designated by the boards of supervisors of said counties, and the amount realized from the interest thereon shall be used for the purposes of the said counties under the direction of the said boards of supervisors. (Amended by L. 1901, chap. 168, L. 1904, chaps. 111 and 456.)

§ 4. A plank-road, turnpike or bridge acquired pursuant to this act shall become part of the highway system of such county, and of the towns, cities and villages in which the same is located, and shall thereafter be repaired and maintained in the same manner as the other highways and bridges therein.

§ 5. When a plank-road, turnpike, tollroad, or bridge is partly in one county and partly in another, the board of supervisors of the said counties shall act together, in the manner prescribed above, and determine the amount to be paid to said plankroad, turnpike, tollroad, or bridge company, by each county, and such amount against each county, after such determination, shall be paid by each county.

CHAPTER VIII.

Motor Vehicles.

L. 1904, chap. 538, known as the "Motor Vehicle Law," reads as follows:—

Section 1. Subdivision 1. **Short title.**—The short title of this act shall be the "motor vehicle law." Except as otherwise herein provided, it shall be controlling, (1) upon the registration and numbering of motor vehicles and chauffeurs, (2) on their use of the public highways, and (3) on the penalties for the violation of any of the provisions of this act.

Subdivision 2. **Definitions.**—The words and phrases used in this act shall, for the purposes of this act, unless the same be contrary to or inconsistent with the context, be construed as follows: (1) "motor vehicle" shall include all vehicles propelled by any power other than muscular power, excepting such motor vehicles as run only upon rails or tracks, provided that nothing herein contained shall, except as provided by subdivision four of section three of this act, apply to motor cycles, motor bicycles, traction engines or road rollers; (2) "public highways" shall include any highway, county road, state road, public street, avenue, alley, park, parkway, driveway or public place in any city, village or town; (3) "closely built up" shall mean, (a) the territory of a city, village or town contiguous to a public highway which is at that point built up with structures devoted to business, (b) the territory of a city, village or town contiguous to a public highway not devoted to business, where for not less than one-quarter of a mile the dwelling houses on such highway average less than one hundred feet apart, and also (c) the territory outside of a city or village contiguous to a public highway within a distance of one-half mile from any postoffice, provided that for a distance of at least one-quarter of a mile within such limits the dwelling houses on such highway average less than one hundred feet apart, and provided further that the local authorities having charge of such highway shall have placed conspicuously thereon signs of sufficient size to be easily readable by a person using the highway, bearing

the words "Slow down to ten miles," and also an arrow pointing in the direction where the speed is to be reduced; (4) "local authorities" shall include all officers of counties, boroughs, cities, villages or towns, as well as all boards, committees and other public officials of such counties, boroughs, cities, villages or towns; (5) "chauffeur" shall mean any person operating a motor vehicle as mechanic, employe or for hire.

§ 2. Subdivision 1. Filing statement.—Every person hereafter acquiring a motor vehicle shall, for every vehicle owned by him, file in the office of the secretary of state a statement of his name and address, with a brief description of the vehicle to be registered, including the name of the maker, factory number, style of vehicle and motor power, on a blank to be prepared and furnished by such secretary for that purpose; the filing fee shall be two dollars.

Subdivision 2. Registration and record.—The secretary of state shall thereupon file such statement in his office, register such motor vehicle in a book or index to be kept for that purpose, and assign it a distinctive number.

Subdivision 3. Registration seal.—The secretary of state shall forthwith on such registration, and without other fee, issue and deliver to the owner of such motor vehicle a seal of aluminum or other suitable metal, which shall be circular in form, approximately two inches in diameter, and have stamped thereon the words "Registered motor vehicle, No. ——, New York motor vehicle law," with the registration number inserted therein; which seal shall thereafter at all times be conspicuously displayed on the motor vehicle, to which such number has been assigned.

Subdivision 4. Owners previously registered.—If the vehicle has been previously registered, the certificate issued thereon shall be returned to the secretary of state and in lieu thereof such secretary shall issue to said owner a registration seal containing the number of such previous registration, upon payment of a fee of one dollar. Upon the sale of a motor vehicle the vendor, except a manufacturer or dealer, shall, within ten days, return to the secretary of state the registration seal affixed to such vehicle.

Subdivision 5. Display of registration number.—Every motor vehicle shall also at all times have the number assigned to it by the secretary of state displayed on the back of such vehicle in such manner as to be plainly visible, the numbers to be in Arabic numerals, black on white ground, each not less than three inches in height, and each stroke to be of a width not less than half an inch, and also as a part of such number the initial letters of the state in black on white ground, such letters to be not less than one inch in height.

Subdivision 6. Registration by manufacturers or dealers.—A manufacturer of or dealer in motor vehicles shall register one vehicle of each style or type manufactured or dealt in by him, and be entitled to as many duplicate registration seals for each type or style so manufactured or dealt in as he may desire on payment of an additional fee of fifty cents for each duplicate seal. If a registration seal and the corresponding number shall thereafter be affixed to and displayed on every vehicle of such type or style as in this section provided, while such vehicle is being operated on the public highways, it shall be deemed a sufficient compliance with subdivisions one, three, five and eight of this section, until such vehicle shall be sold or let for hire. Nothing in this subdivision shall be construed to apply to a motor vehicle employed by a manufacturer or dealer for private use or for hire.

Subdivision 7. Fictitious seal or number.—No motor vehicle shall be used or operated upon the public highways after thirty days after this act takes effect which shall display thereon a registration seal or number belonging to any other vehicle, or a fictitious registration seal or number.

Subdivision 8. Unregistered vehicle not to be operated.—No motor vehicle shall be used or operated upon the public highways after thirty days after this act takes effect, unless the owner shall have complied in all respects with this section, except that any person purchasing a motor vehicle from a manufacturer, dealer or other person after this act goes into effect shall be allowed to operate such motor vehicle upon the public highways for a period of five days after the purchase and delivery thereof, provided that during such period such motor

vehicle shall bear the registration number and seal of the previous owner under which it was operated or might have been operated by him.

Subdivision 9. Exemption of nonresident owners.—The provisions of this section shall not apply to motor vehicles owned by nonresidents of this state, provided the owners thereof have complied with any law requiring the registration of owners of motor vehicles in force in the state, territory or federal district of their residence, and the registration number showing the initial of such state, territory or federal district shall be displayed on such vehicle substantially as in this section provided.

§ 3. Subdivision 1. Speed permitted.—No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or the safety of any property; or in any event on any public highway where the territory contiguous thereto is closely built up, at a greater rate than one mile in six minutes, or elsewhere in a city or village at a greater rate than one mile in four minutes, or elsewhere outside of a city or village at a greater rate than one mile in three minutes; subject, however, to the other provisions of this act.

Subdivision 2. Speed at crossings, et cetera.—Upon approaching a bridge, dam, sharp curve, or steep descent, and also in traversing such bridge, dam, curve or descent, a person operating a motor vehicle shall have it under control and operate it at a rate of speed not exceeding one mile in fifteen minutes, and upon approaching a crossing of intersecting highways at a speed not greater than is reasonable and proper, having regard to the traffic then on such highway and the safety of the public.

Subdivision 3. Meeting horses, et cetera.—Upon approaching a person walking in the roadway of a public highway, or a horse or horses, or other draft animals, being ridden, led or driven thereon, a person operating a motor vehicle shall give reasonable warning of its approach, and use every reasonable precaution to ensure the safety of such person or animal, and, in the

case of horses or other draft animals, to prevent frightening the same.

Subdivision 4. Stopping on signal.—A person operating a motor vehicle or motor cycle or motor bicycle shall, at request or on signal by putting up the hand, from a person riding, leading or driving a restive horse or horses or other draft animals, bring such motor vehicle, cycle or bicycle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor vehicle is requested so to do, such person shall cause the motor of such vehicle, cycle or bicycle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others.

Subdivision 5. Giving name and address.—In case of accident to a person or property on the public highways, due to the operation thereon of a motor vehicle, the person operating such vehicle, shall stop, and, upon request of a person injured, or any person present, give such person his name and address, and, if not the owner, the name and address of such owner.

Subdivision 6. Speed tests and races.—Local authorities may, notwithstanding the other provisions of this section, set aside for a given time a specified public highway for speed tests or races, to be conducted under proper restrictions for the safety of the public.

§ 4. Subdivision 1. Rules of the road.—Whenever a person operating a motor vehicle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals, or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, turn to the

right so as to allow free passage on the left. Any such person so operating a motor vehicle shall at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left. Nothing in this subdivision shall, however, be construed as limiting the meaning or effect of the provisions of section three of this act.

Subdivision 2. Brakes, lamps, horn, et cetera.—Every motor vehicle while in use on a public highway shall be provided with good and efficient brakes, and also with a suitable bell, horn or other signal and be so constructed as to exhibit, during the period from one hour after sunset to one hour before sunrise, two lamps showing white lights visible within a reasonable distance in the direction toward which such vehicle is proceeding, showing the registered number of the vehicle in separate Arabic numerals, not less than one inch in height and each stroke to be not less than one-quarter of an inch in width, and also a red light visible in the reverse direction.

Subdivision 3. Local ordinances prohibited.—Subject to the provisions of this act, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highways, or excluding or prohibiting any motor vehicle whose owner has complied with section two of this act from the free use of such highways, except such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages, or except as herein provided, in any way affecting the registration or numbering of motor vehicles or prescribing a slower rate of speed than herein specified at which such vehicles may be operated, or the use of the public highways, contrary to or inconsistent with the provisions of this act; and all such ordinances, rules or regulations now in force are hereby declared to be of no validity or effect; provided, however, that the local authorities of cities and incorporated villages may limit by ordinance, rule or regulation hereafter adopted the speed of motor vehicles on the public highways, on condition that such ordinance, rule or regulation shall also fix the same speed limi-

tation for all other vehicles, such speed limitation not to be in any case less than one mile in six minutes in incorporated villages, and on further condition that such city or village shall also have placed conspicuously on each main public highway where the city or village line crosses the same, and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words "Slow down to —miles" (the rate being inserted) and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the penalties for violation thereof similar to and no greater than those fixed by such local authorities for violations of speed limitation by any other vehicles than motor vehicles, which penalties shall during the existence of the ordinance, rule or regulation supersede those specified in section six of this act, and provided further, that nothing in this act contained shall be construed as limiting the power of local authorities to make, enforce and maintain further ordinances, rules or regulations, affecting motor vehicles which are offered to the public for hire.

Subdivision 4. Parks, parkways and cemeteries excepted.—Local authorities may, notwithstanding the provisions of this act, make, enforce and maintain such reasonable ordinances, rules or regulations concerning the speed at which motor vehicles may be operated in any parks or parkways within a city but, in that event, must, by signs at each entrance of such park and along such parkway, conspicuously indicate the rate of speed permitted or required, and may exclude motor vehicles from any cemetery or grounds used for the burial of the dead.

Subdivision 5. No effect on right to damages.—Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligent use of the highways by a motor vehicle or its owner or his employee or agent.

§ 5. Subdivision 1. Filing chauffeur's statement.—Every person hereafter desiring to operate a motor vehicle as a chauffeur

shall file in the office of the secretary of state, on a blank to be supplied by such secretary, a statement which shall include his name and address and the trade name and motive power of the motor vehicle or vehicles he is able to operate; and shall pay a registration fee of two dollars.

Subdivision 2. Chauffeur's registration and record.—The secretary of state shall thereupon file such statement in his office, register such chauffeur in a book or index to be kept for that purpose, and assign him a number.

Subdivision 3. Chauffeur's badge.—The secretary of state shall forthwith, upon such registration and without other fee, issue and deliver to such chauffeur a badge of aluminum or other suitable metal, which shall be oval in form, and the greater diameter of which shall not be more than two inches, and such badge shall have stamped thereon the words: "Registered chauffeur, No. ——, New York motor vehicle law," with the registration number inserted therein; which badge shall thereafter be worn by such chauffeur pinned upon his clothing in a conspicuous place at all times while he is operating a motor vehicle upon the public highways. If the operator or chauffeur has previously been registered in the office of the secretary of state, the certificate heretofore issued to him, shall be returned to such secretary, who shall issue to said operator or chauffeur, in lieu thereof, a chauffeur's badge upon the payment of a fee of one dollar.

Subdivision 4. Fictitious badge.—No chauffeur, having registered as hereinabove provided, shall voluntarily permit any other person to wear his badge, nor shall any person while operating a motor vehicle wear any badge belonging to another person, or a fictitious badge.

Subdivision 5. Unregistered chauffeur cannot operate.—No person shall operate a motor vehicle as a chauffeur upon the public highways after thirty days after this act takes effect, unless such person shall have complied in all respects with the requirements of this section.

§ 6. Subdivision 1. Penalties for excessive speed, et cetera.—The violation of any of the provisions of subdivision five of

section two, or of subdivision seven of section two, or of section three, or of section five of this act, or of any ordinance, rule or regulation adopted by local authorities in pursuance of subdivision four of section four of this act, shall be deemed a misdemeanor, punishable by a fine not exceeding one hundred dollars for the first offense, and punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding thirty days, or both, for a second offense, and punishable by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars and imprisonment not exceeding thirty days for a third or subsequent offense.

Subdivision 2. Penalties for other violations.—The violation of any other provision of this act shall be punished by a fine not exceeding twenty-five dollars for the first offense, a fine not less than twenty-five dollars nor more than fifty dollars for a second offense, and a fine not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding ten days, or both, for a third or subsequent offense.

Subdivision 3. Release from custody, bail, et cetera.—In case the owner of a motor vehicle shall be taken into custody because of a violation of any provision of this act, he shall be forthwith taken before an accessible captain or sergeant or acting sergeant of police in any city or village, or any justice of the peace or magistrate, and be entitled to an immediate hearing; and if such hearing cannot then be had, be released from custody on giving his personal undertaking to appear in answer for such violation, at such time and place as shall then be indicated, secured by the deposit of a sum equal to the maximum fine for the offense with which he is charged, or in lieu thereof, by leaving the motor vehicle, being operated by such person, with such officer; or, in case such officer is not accessible, be forthwith released from custody on giving his name and address to the officer making such arrest, and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made, or in lieu thereof, by leaving the motor vehicle, being operated by such person, with such officer, provided that in such case the officer making such arrest shall give a receipt in writing for such sum or vehicle and notify such person to

appear before the most accessible magistrate, naming him, on that or the following day, specifying the place and hour. In case security shall be deposited, as in this subdivision provided, it shall be returned to the person depositing, forthwith on such person being admitted to bail as provided in section five hundred and fifty-four of the code of criminal procedure, and the return of any receipt or other voucher given at the time of such deposit. In case such undertaking with security or such deposit shall not be made by an owner so taken into custody, the provisions of section five hundred and fifty-four of the code of criminal procedure shall apply.

§ 7. Acts repealed.—All acts and parts of acts inconsistent herewith or contrary hereto are, so far as they are inconsistent or contrary, hereby repealed.

§ 8. When this act takes effect.—This act shall take effect immediately, except that no penalty shall be asserted or imposed for the violation of any of the provisions of section two or section five hereof committed prior to thirty days after this act takes effect.

CHAPTER IX.

BICYCLES ON HIGHWAYS.

1. Construction and Maintenance of Sidepaths.

L. 1899, chap. 152, entitled "An act in relation to the use of bicycles on sidepaths, for licensing bicycles, for the appointment of sidepath commissioners and to provide for the construction, maintenance, regulation, preservation and shading of side paths," reads as follows:

§ 1. The county judge of any county except Albany, may, upon the petition of fifty resident wheelmen of such county, appoint from the resident citizens thereof, five or seven persons, the number to be determined by such judge, giving to each city and to one or more towns in such county, a representation on the board as near as possible in proportion to the probable number of cyclists residing in such localities, each of whom shall be a cyclist, who shall constitute a board of sidepath commissioners for such county. The terms of such commissioners if the number be five, shall be one, two, three, four and five years respectively, and if the number appointed be seven, the terms of such commissioners shall be, two to serve one year, two to serve two years, and one each to serve three, four and five years from and including the first day of January of the year in which the appointment is made, to be determined by such commissioners by lot, within one month after their appointment. A commissioner thereafter appointed for a full term, shall hold office for five years from and including the first day of January of the year in which the appointment is made. A commissioner appointed to fill a vacancy occurring otherwise than by expiration of term, shall be appointed for the unexpired term of his predecessor in office. Whenever a vacancy shall occur in the office of such a commissioner, by expiration of term or otherwise, the chairman or secretary of the board shall immediately file a notice with the county judge, specifying the name of such commissioner, the city or town in which he resided, and the term for which his successor shall be appointed. Upon the

receipt of such notice the county judge shall thereupon appoint a person to fill such vacancy and file such appointment in the office of the county clerk. The county clerk shall forthwith notify such person of his appointment, and he shall take office immediately upon filing his written acceptance thereof with the county clerk, and taking the constitutional oath of office. If any person so appointed fails to file such acceptance with the county clerk or to take the constitutional oath of office within ten days after receiving notice of his appointment, or if any member of the board fails to attend three consecutive regular meetings without being excused by a vote of the board, the board of sidepath commissioners may declare the place vacant by a majority vote of the board. In case charges against any such commissioner are made in writing and filed with the county judge, said county judge may notify such commissioner to appear and make answer to such charges, and may remove such commissioner from office if sufficient cause be shown. Such commissioners shall serve without compensation, but shall be repaid their actual and necessary disbursements out of the sidepath fund. The present boards of sidepath commissioners appointed pursuant to chapter one hundred and fifty-two of the laws of eighteen hundred and ninety-nine and chapter one hundred and ninety-four of the laws of eighteen hundred and ninety-nine are hereby continued to the end of the terms of the respective members thereof. (Amended by L. 1900, chap. 640.)

§ 2. Such board of sidepath commissioners is hereby authorized and empowered to construct and maintain sidepaths along any public road, or street, or section thereof of the county provided, the said board of sidepath commissioners shall be required to obtain the written approval of the commissioner of highways, or other officer performing similar duties, or the written approval of the supervisor of each town in which said sidepath shall be built, and file the same in the town clerk's office, before constructing paths along any road outside the limits of incorporated cities or villages; and provided, that they shall be required to secure the approval of the trustees of an incorporated village by a resolution at a meeting thereof, before

constructing paths along any street of such village; and provided, that they shall be required to secure the approval of the common council of a city by resolution at a meeting thereof, before constructing paths along any street, or section thereof, in such city. No sidepath shall be constructed upon or along any regularly constructed or maintained sidewalk, except with the consent of the persons owning the abutting lands. Such paths shall not be less than three or more than six feet wide, without the consent of the owners of abutting lands, and shall be constructed within the outside lines and along and upon either side of such public roads or streets. The term "sidewalk" as used in this act, means any sidewalk constructed or maintained as such by the public authorities or the owner of the abutting lands, which is reserved by custom for the use of pedestrians; but not including foot paths or portions of the public road which are worn only by travel. The term "sidepath" shall be construed to include any path built or acquired by a sidepath commission. No member or any number of members of a sidepath commission shall begin or in any way authorize the construction of a sidepath, to be built from the sidepath fund, until the record of the proceedings of the board shows that it has voted to construct such path. Boards of sidepath commissioners are authorized upon unanimous vote of the board, to acquire, by gift, purchase or lease, any lands outside of the regular highways necessary for the purpose of building sidepaths, and to expend any of the funds in their possession for this purpose. (Amended by L. 1900, chap. 640.)

§ 3. Such board of sidepath commissioners shall at their first meeting, or within a reasonable time thereafter, and in each succeeding calendar year, adopt a form of license, badge, emblem or device suitable to be affixed to a bicycle and to be known as a bicycle sidepath license. Any person upon the payment of a fee, to be determined by such commissioners, of not less than fifty cents nor more than one dollar, except in the county of Monroe where the fee shall continue to be twenty-five cents, shall be entitled to receive such license, which shall be good during the calendar year for which it is issued, and no

longer. Every such license to be valid must be issued by the commissioners of the county wherein the bicyclist resides, except that any bicyclist who resides in another state or in some county of this state where there is no sidepath commission, may secure a license in any county where a sidepath commission has been lawfully appointed and such license shall be valid for the use of the person so purchasing till a sidepath commission is organized in the county where such person resides, or for the calendar year for which it is issued and no longer. No person shall ride a bicycle on any sidepath in any county of this state where a sidepath commission has been, or at any time hereafter may be appointed, unless a valid bicycle license is attached or affixed to the left side of the front fork thereof so that the license shall show on the left side of such bicycle. No person shall counterfeit any such license or make, sell, give away or have on his or her bicycle, a license purporting to be issued by any county in this state, unless regularly issued by the respective boards of sidepath commissioners appointed pursuant to law. No license shall be valid unless attached to a bicycle as aforesaid. Such license shall be plainly numbered and shall not be valid if the number has been mutilated or changed, so as to deceive or be calculated to deceive. No person shall have a license issued for a prior year or anything in the similitude of such a license attached to his or her bicycle in the place aforesaid except a valid license for the calendar year in which it is so used. (Amended by L. 1900, chap. 640.)

§ 4. The license fees collected by the said boards of sidepath commissioners shall be deposited on or before the first day of each month with the county treasurer of their respective counties, by whom they shall be credited to a special fund, to be called "the sidepath fund," upon which the boards of sidepath commissioners are authorized to draw warrants signed by a majority of the board, but no warrants shall be so drawn in excess of the amount actually on deposit; nor shall any contract or purchase be made exceeding the amount of such funds at the time of making such contract or purchase. All bills shall be sworn to. Each board of sidepath commissioners shall re-

port annually to the county judge of their respective counties, giving a detailed financial statement and filing with said report the vouchers of each expenditure, which report and vouchers shall be deposited in the county clerk's office. (Amended by L. 1900, chap. 640.)

§ 5. The said boards of sidepath commissioners shall devote the moneys so collected to the repairing of existing paths in their respective counties; to the construction of new paths; to the planting of shade trees along such paths, where the consent of the owners of abutting lands to the planting of said trees has been obtained; to the maintaining of order on the paths; and the necessary and authorized expenses incurred in enforcing this act. (Amended by L. 1900, chap. 640.)

§ 6. No person shall willfully lead, stand, hitch, ride or drive any horse, cattle, sheep, swine or other animals upon any sidepath now constructed or hereafter to be constructed in this state, except for the purposes of access to, and egress from, lands abutting on the highway. (Amended by L. 1900, chap. 640.)

§ 7. No person shall willfully obstruct, injure or destroy any sidepath or any portion thereof, now constructed or hereafter to be constructed in this state. (Amended by L. 1900, chap. 640.)

§ 8. No person shall ride a bicycle at a greater rate of speed than ten miles an hour when passing another cyclist or pedestrian on any sidepath in this state. (Amended by L. 1900, chap. 640.)

§ 9. The sidepaths heretofore constructed and hereafter to be constructed in this state are hereby placed under the control and direction of the boards of sidepath commissioners of the various counties in which they are located. In every county in which a county engineer is now, or shall hereafter be appointed, pursuant to the provisions of the highway law, all the rights, duties, powers and authority conferred or imposed by this act or any other statute upon the board of sidepath commissioners shall be vested in and performed by the said county

engineer, and no sidepath commissioners shall be appointed in any county having such county engineer. In any county in which a county engineer has heretofore been appointed the board of sidepath commissioners shall turn over to said county engineer all the records, books and property of the said board on the first day of June, nineteen hundred and four, whereupon the powers and duties of said board of sidepath commissioners shall cease; and in any county not now having a county engineer, in which a county engineer shall hereafter be appointed, the said commissioners for said county within ten days after such appointment shall turn over to said county engineer all the records, books and property of said board, and thereupon the powers and duties of such commissioners shall cease; but said commissioners shall forthwith file a final report of their transactions down to the transfer to the county engineer, accompanied with vouchers as required for their annual reports. All the provisions of law relating to the acts or determinations of boards of sidepath commissioners are hereby made applicable to the acts and determinations in the premises of said county engineer. The said county engineer shall keep a record of his acts, transactions and determinations in relation to the sidepaths, and of all expenditures by him, stating the locality and character of repairs, additions or alterations to sidepaths in said county, with the amounts expended therefor, and said county engineer is authorized to employ such servants, employees and clerks as may be necessary to carry out the provisions of this act, but within the limitations of section four of this act. (Amended by L. 1900, chap. 640, and L. 1904, chap. 342.)

§ 10. Any board of sidepath commissioners, with the consent of the commissioner of highways or other officer performing similar duties, having jurisdiction thereof, may remove limbs of trees overhanging any sidepath in the county wherein said board has jurisdiction, when in the judgment of said board, the same shall interfere with the free passage of bicycles along said paths. (Amended by L. 1900, chap. 640.)

§ 11. Any person who rides a bicycle on any sidepath in this state in violation of any of the sections of this act, or does

any of the acts by the provisions of this law forbidden, is guilty of a misdemeanor, and shall be punishable by a fine of not less than five nor more than twenty-five dollars, and in case of failure to pay any fine that may be imposed, such person may be committed to jail not exceeding one day for each dollar of such fine. A sheriff of any county, and all deputy sheriffs appointed by him, are authorized to do all the acts and perform all the duties with respect to violations of this act, that constables may do or perform; and shall be entitled to receive the same fees that constables receive for such services, to be audited and paid in the same manner that constables' fees for such services are audited and paid. (Amended by L. 1900, chap. 640, and L. 1902, chap. 305.)

§ 12. Courts of special sessions having jurisdiction to try misdemeanors as provided by section fifty-six of the code of criminal procedure, shall have exclusive jurisdiction to try offenders in all cases occurring under this act, in the same manner as in other cases where they now have jurisdiction, and subject to the same power of removal and to render and enforce judgment to the extent herein provided. (Amended by L. 1900, chap. 640.)

2. Municipal ordinances relating to use of bicycles.

L. 1899, chap. 634, entitled "An Act to regulate the use of bicycles, tricycles and similar vehicles, and to require uniformity of ordinances affecting the same," reads as follows:

Municipal ordinances.—§ 1. The municipal officers and boards in the several cities, towns, and villages of this state now having the authority to enact such ordinances, may pass ordinances regulating the use of bicycles, tricycles and similar vehicles on the public highways, streets, avenues, walks, parks and public places within their limits in accordance with the following provisions, and not otherwise:

Lights.—1. To require all bicycles, tricycles and similar vehicles when ridden on such public highways, streets, avenues, walks or public places to have attached thereto or carried therewith a light of such illuminating power as to be plainly seen

two hundred feet ahead, and kept lighted between one hour after sunset and one hour before sunrise; but this section shall not apply to any rider whose light has become extinguished or who is necessarily absent from his or her home without a light, when going at a pace not exceeding six miles an hour, when an audible signal is given as provided in subdivision two of this section as often as thirty feet are passed over.

Signals.—**2.** To require riders of all such bicycles, tricycles or similar vehicles to give an alarm by bell, whistle or otherwise, which may be heard one hundred feet distant, when about to meet or pass pedestrians and when about to meet or pass other vehicles.

Rate of speed.—**3.** To regulate the rate of speed at which it may be lawful to ride such bicycles, tricycles or similar vehicles; provided however that cyclists shall not be restricted to a rate of speed slower than is allowed any other kind or class of vehicle.

Coasting and carrying of children; permits for special occasions.

—**4.** To regulate or prohibit coasting or proceeding by inertia or momentum with the feet off the pedals; the carrying of children under five years of age upon bicycles; the observance by cyclists, of such rules of the road as are established by the highway law; to permit the authorities of such municipality having charge of the public highways, streets, squares or parks, in their discretion, upon any special occasion, to grant permits to any person or persons to ride such machines during a specified time, upon specified portions of the public streets or highways of such city, town or village, at any rate of speed, and annex such other reasonable conditions to such permits as they shall deem proper; and the said authorities of such municipality may, also, under such conditions as they may deem proper, permit the use of velocipedes and other similar machines by children on any sidewalk in any public way, square, or park in such municipality.

Riding upon sidewalks.—**5.** To regulate or prohibit the riding of any bicycles, tricycles or similar vehicles upon the sidewalks within the limits of any city, town or village; except that no city, town or village shall have any power to prohibit the riding

of any bicycles upon any sidewalk within the limits of such city, town or village when said sidewalk shall have been or shall be hereafter constructed solely at the expense of wheelmen or cyclists by and with the consent of the officers having jurisdiction therein, unless the road or street in front of said sidewalk is paved with some smooth and permanent pavement like asphalt or brick, and maintained in a condition suitable for the use of cycles. The term "sidewalk," as used in this act, means any sidewalk laid out as such by any city, town or village, or by the owners of the abutting lands which is reserved, by custom for the use of pedestrians, and which has been especially prepared for their use, but not including footpaths or portions of public roads lying outside of the thickly settled parts of cities and towns which are worn only by travel, and are not improved by the public authorities, or by the abutting owners.

Penalties.—6. To provide that every person violating any such ordinances shall be punished by a fine not exceeding the sum of five dollars for each offense, and in case of the nonpayment of such fine, by imprisonment in the county jail not exceeding one day for each dollar of such fine, in the discretion of the court or magistrate.

No other ordinances to be made.—§ 2. No city, town or village, shall have any power to make any ordinance, by-law or regulation respecting the use of bicycles or tricycles except as provided in this act; and except as provided in this act, no ordinance, by-law or regulation heretofore or hereafter made by a city, town or village, in respect to bicycles or tricycles shall have any force or effect. Nothing in this act shall affect the jurisdiction of sidepath commissioners nor the use of sidepaths.

Security for appearance upon arrest.—§ 3. Any person arrested for the violation of any of the provisions of this act, or of any ordinance or by-law adopted as provided in this act, may tender at the time of his or her arrest, or at any time before the hearing thereon either five dollars in current money, or his or her bicycle or similar vehicle, as security for his or her appearance in court to make answer to the charge of violating the provisions of this act or any ordinance or by-law adopted as provided

in this act; and the officer making the arrest, shall accept the security, which the rider may offer, as aforesaid, for his appearance, before the most convenient court or magistrate, to be specified by said officer at a time to be fixed by him not less than one day, in said city, village or town having jurisdiction of the offense, and such security shall be forthwith delivered, by such officer, to such court or magistrate. In case the person arrested shall fail to appear and answer to such charge at the time so specified or at such other time to which the matter shall have been adjourned, such security shall be forfeited, and if money, shall be disposed of in the same manner as other fines are disposed of by such court or magistrate, and, if a bicycle or similar vehicle, it may be sold under the direction of such court or magistrate at public sale, a notice of which sale shall be posted in three public places in such city, town or village, and a copy thereof served personally or by mail upon the person who tendered the same at least six days before such sale, and five dollars of the money received upon such sale shall be disposed of in the same manner as other fines collected by such court or magistrate, and the remainder of the money received upon such sale shall be paid to the owner of such bicycle or other similar vehicle on demand.

CHAPTER X.

Action or Special Proceeding, Relating to an Animal Straying upon the Highway.

(Code of Civil Procedure, §§ 3082-3115.)

- Section 3082. Action against person suffering animals to stray.
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Proceedings in such cases.
3110. Proceedings in other cases, where there are different owners.
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3112. When on action, etc., supersedes any other.
3113. Rights of officer when private person fails to prosecute.
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3115. Agent may act for his principal.

§ 3082. Action against person suffering animals to stray.—Any person, who suffers or permits one or more cattle, horses, colts, asses, mules, swine, sheep, or goats, to run at large, or to be herded or pastured, in a public street, highway, park, or place elsewhere than in a city, incurs thereby the penalty or penalties specified in the next section; and any resident of the town, or the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section twenty-eight hundred and

seventy-five of this act, or the overseer or superintendent of the poor of the town or district in which one or more of those animals are found so running at large, herded, or pastured, may maintain an action against him, in a justice's court, held in that town or district, to recover the penalty or penalties so incurred. Where the action is brought by a private person, the justice must pay the proceeds of an execution, issued upon a judgment therein in favor of the plaintiff, after deducting the costs, to the officer, who might have brought the action, as prescribed in this section, to be applied by him to the support of the poor within his town or district.

§ 3083. Penalties to be recovered.—If the plaintiff recovers judgment, in an action brought as prescribed in the last section, the justice must award to him the following sums, by way of penalties, besides the costs of the action:

1. For each horse, colt, ass, mule, swine, bull, ox, cow, or calf, five dollars.
2. For each sheep or goat, one dollar.

The entire amount of the penalties may be recovered, in one action, although it exceeds the sum for which a justice can render a judgment in an ordinary action.

§ 3084. Certain officers to seize animals straying.—Where one or more cattle, horses, colts, asses, mules, swine, sheep, or goats are found running at large, or being herded or pastured, in a public street, highway, park, or place elsewhere than in a city, the overseer of highways of the road district, or, if they are so found within an incorporated village, the street commissioner thereof, having personal knowledge or being notified of the fact, must immediately seize the animal or animals, and keep it or them in his possession until disposed of as prescribed in the following sections of this title.

§ 3085. When private person may seize such animals.—Any person may seize one or more animals specified in the last section, then running at large, or being herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, bordering upon real property owned or occupied by him; or then trespassing upon real property so owned or occupied, having en-

tered thereupon from such a public street, highway, park, or place. The person making the seizure, must keep the animal or animals seized in his possession, until disposed of as prescribed in the following sections of this title.

§ 3086. Officer or person seizing to present petition.—An officer or other person, who seizes an animal or animals, as prescribed in either of the last two sections, must immediately file, with a justice of the peace of the town in which the seizure was made, a written petition, verified by his oath; setting forth the facts which bring the case within either of those sections; briefly describing the animal or animals seized; stating either the name of the owner, or that his name is not known to the petitioner, and cannot be ascertained by him with reasonable diligence; and praying for a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Where the petition alleges, that any animal or animals seized, were then trespassing upon real property owned or occupied by the petitioner, it must state the amount of the damages, if any, which the petitioner has sustained thereby. In that case, the decision of the justice, or, where the issues are tried by a jury, the verdict must fix the amount of the damages.

§ 3087. Precept thereupon.—Upon the presentation of the petition, the justice must issue a precept under his hand; directed to the owner, if his name is stated in the petition, or, if it is not so stated, directed generally to all persons having an interest in the animal or animals seized; briefly reciting the substance of the petition; describing the animal or animals seized, and requiring the person or persons, to whom the precept is directed, to show cause before the justice, at a time and place specified therein, not less than ten nor more than twenty days, after the issuing of the precept, why the prayer of the petition should not be granted.

§ 3088. Id.; how served.—The precept must be served upon the person, to whom it is directed by his name, within the same time, and in like manner as a summons is required to be served, as prescribed in section twenty.

nine hundred and ten of this act. Where it is directed generally to all persons, having an interest in the animal or animals seized, it may be served by a constable of the town, or by an elector thereof, specially authorized so to do by a written indorsement upon the precept, under the hand of the justice, by posting a copy thereof in at least six public and conspicuous places in the town where the seizure was made; one of which places must be the nearest district schoolhouse, or, if the seizure was made within an incorporated village, having schools in charge of a board of education, a building in which such a school is kept. Each copy must be so posted, within two days after the precept is issued. Where the precept is directed to a person by his name, and proof is made by affidavit, to the satisfaction of the justice, that it cannot, with reasonable diligence, be personally served upon that person, within the county, at least six days before the return day thereof, the justice may, by a written order, direct that service thereof be made, by posting copies thereof, at least five days before the return day, as prescribed in this section; in which case, service thereof may be made accordingly.

§ 3089. Proof of service of precept.—At the place where the precept is returnable, and at the expiration of the time specified in section twenty-eight hundred and ninety-three of this act, the petitioner must, unless the precept is directed to a person by his name, and he appears, furnish proof of the service of the precept, as prescribed in the last section. If it was served by a constable, either personally or by posting, his written return upon the precept is sufficient proof of the facts relating to the service, as stated therein. If it was served by a private person, proof of service must be made by affidavit.

§ 3090. Answer; trial.—The owner, or a person having an interest in any animal seized, may appear upon the return of the precept, and thereby make himself a party to the special proceeding. The person so appearing may, upon the return of the precept, file a written answer, subscribed by him or his attorney, and verified by the oath of the person subscribing it, denying, absolutely or upon information and belief, one or more

material allegations contained in the petition. His answer must also set forth his interest in the animal or animals seized. The subsequent proceedings must be the same as in an action in a justice's court, wherein an issue of fact has been joined, except as otherwise specially prescribed in this title.

§ 3091. Decision in favor of petitioner; warrant to sell; execution thereof.—If no person appears and answers, or if the decision of the justice, or the verdict of the jury, where the issues were tried by a jury, is in favor of the petitioner, the justice must make a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Thereupon the justice must issue a warrant, under his hand, directed generally to any constable of the county, commanding him to sell the animal or animals seized, at public auction, for the best price which he can obtain therefor; and to make return thereof to the justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. The sale must be made upon the like notice, and in like manner, as a sale of property, by virtue of an execution issued by a justice of the peace; and the constable must make return, as required by the warrant, and must pay the proceeds of the sale to the justice, deducting therefrom his fees, at the rate allowed by law for the collection of such an execution.

§ 3092. Application of proceeds of sale.—The justice must apply the proceeds of the sale as follows:

1. He must pay the costs of the petitioner, as taxed by the justice, at the same rates as the costs of an action brought before him, including the justice's fees in such an action; and also the fees for the service of the precept, either personally or by posting, at the rate allowed by law for personal service of a summons by a constable.

2. Out of the remainder of the proceeds, he may retain to his own use, a fee of one dollar, for each animal sold.

3. Out of the remainder of the proceeds, he must pay to the officer, or other person making the seizure, the following fees, for the seizure of each animal seized and sold, to-wit: one dol-

lar for each horse, colt, ass, or mule; fifty cents for each bull, ox, cow, or calf; and twenty-five cents for each goat, sheep, or swine; together with a reasonable compensation, fixed by him, for the care and keeping of each animal, from the time of the seizure to the time of the sale; and, also, where any animal sold was seized, while trespassing upon real property owned or occupied by the petitioner, the damages sustained by the petitioner in consequence thereof, as ascertained by the decision of the justice, or the verdict of the jury upon which the final order was made.

4. Out of the remainder of the proceeds, he must pay to the officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section twenty-eight hundred and seventy-five of this act, the following penalties, to wit: five dollars for each horse, colt, ass, mule, bull, ox, cow, calf, or swine, seized and sold; and one dollar for each sheep or goat, seized and sold; which penalties must be received by the officer, for the benefit of the poor of his town or district.

5. If any surplus remains, he must pay the same to the person or persons entitled thereto, as prescribed in the following sections of this title.

§ 3093. Disposition of surplus.—Any person may, within ten days after the return of the warrant, file, with the justice, a written claim to the surplus of the proceeds of the sale, or to any part thereof. On the eleventh day after the return, or, if it is a Sunday or a public holiday, on the first day thereafter, which is neither Sunday nor a public holiday, the justice must proceed to inquire into the claims so filed; and, for the purpose of determining them, he must hear the allegations and proofs of each claimant; and he may issue subpoenas, as upon the trial of an action. He may, upon the application of any claimant, and for good cause shown, adjourn the hearing, from time to time, but not more than thirty days in all. After hearing the allegations and proofs of all the claimants, he must decide the claims, and enter an order accordingly. If no claim is filed; or if the right to the surplus money, or any part thereof, is not established, to the satisfaction of the justice, as prescribed in

this section; any person, whose claim was not determined upon the hearing, may file a claim thereto, at any time before the expiration of a year from the return of the warrant; and, thereupon, the justice must proceed, as prescribed in this section with respect to a claim filed within the ten days.

§ 3094. Id.; when no claim made within a year.—If, at the expiration of one year after the return of the warrant, any portion of the surplus remains, a claim to which has not been established to the satisfaction of the justice, pursuant to the provisions of the last section, the justice must pay it, for the benefit of the poor, to the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section twenty-eight hundred and seventy-five of this act; and, thereupon, all persons are forever barred from any claim thereto. But if a claim, filed as prescribed in the last section, remains undetermined at the expiration of the year, the justice must determine it within ten days thereafter; and, for that purpose, he must retain the surplus in his hands until the determination.

§ 3095. Order upon claim for surplus; appeal therefrom.—An appeal from an order determining a claim, as prescribed in the last two sections, may be taken to the county court, by a claimant, within ten days after the making of the order, as from a judgment of a justice in an action to recover a sum equal to the claim; and the proceedings thereupon are the same, except that an undertaking is not necessary for any purpose. Upon such an appeal, each other claimant, whose interest is affected by the order appealed from, must be made a respondent. If there is no such claimant, the officer entitled to the surplus must be made respondent; but costs cannot be awarded against him, unless he appears upon the appeal; in which case, the costs are in the discretion of the appellate court. Where an appeal, taken as prescribed in this section, is perfected, the county judge may, in his discretion, make an order extending the time within which payment of the surplus must be made, as prescribed in the last section, and staying payment accordingly. Unless such an order is made, and a copy thereof is served upon the justice, payment must be made as prescribed in the last section, notwith-

standing the appeal; and upon proof of the payment, the appeal must be dismissed. Where an appeal is taken to the supreme court, from the determination of the county court, the county judge, or a justice of the supreme court may make a like order, and with like effect.

§ 3096. Proceedings upon decision in favor of person answering.—If the decision of the justice, or the verdict of the jury, where the issues are tried by a jury, is in favor of the person answering, it must fix the value of each animal seized. If the justice or the jury find that the seizure was malicious, and without probable cause, the decision or verdict must assess the damages sustained by the person answering, by means of the seizure and detention. The justice must thereupon make a final order, awarding to the person so answering, the return of the animal or animals so seized, or the value thereof if a return cannot be had; together with his costs, at the rates allowed by law in an action brought before him to recover a chattel; and, also, twice the sum assessed as his damages, if any. Thereupon a warrant must be issued by the justice to a constable, to the same effect, as an execution issued, in an action to recover a chattel, upon a judgment in favor of the defendant, where the chattel has not been delivered to him; and each provision of this chapter, relating to a judgment and an execution in such a case, applies to a final order made, and a warrant issued thereupon, as prescribed in this section.

§ 3097. Demand of possession before trial. Proceedings thereupon.—At any time after the precept is issued, and before the commencement of the trial, the owner of any animal seized may file with the justice a written demand of the possession thereof. Thereupon he is entitled to the possession, upon complying with the following terms:

1. He must pay to the justice, for the use of the petitioner, the costs of the proceedings, to the time of filing the demand as prescribed in subdivision first of section three thousand and ninety-two of this act, and, also, the sums payable on account of each animal, whereof possession is so demanded, as prescribed in subdivision third of the same section; which sums must be

fixed by the justice, after hearing the allegations and proofs of the parties.

2. He must also pay to the justice, a fee of one dollar for each animal, whereof possession is so demanded.

3. If the petitioner is an officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section twenty-eight hundred and seventy-five of this act, the claimant must also pay to the justice, for the petitioner's use, the sum specified therein on account of each animal, whereof possession is so demanded.

4. The claimant must also prove, to the satisfaction of the justice, by affidavit or other competent evidence, that he is the owner of each animal, whereof possession is so demanded. Each person who has appeared must have notice of, and may oppose, the claim.

§ 3098. Id.; when animal willfully set at large by third person.—But where, in a case specified in the last section, the person filing a demand, presents therewith to the justice sufficient proof, by affidavit or otherwise, that the running at large, herding, pasturing, or trespassing, by reason whereof the animal or animals, of which he demands possession, were seized, was caused by the willful act, intended to effect that object, of a person other than the owner; and also makes the proof specified in subdivision fourth of that section; he is entitled to possession, pursuant to his demand, upon paying to the petitioner, or to the justice for his use, a reasonable sum, to be fixed by the justice, after hearing the allegations and proofs of the parties, as compensation for the care and keeping of the animal or animals, whereof possession is so demanded, and without paying any other sum, specified in the last section.

§ 3099. Action by owner in such a case.—The owner of an animal, seized in consequence of a willful act specified in the last section, may recover, in an action against the person who committed it, all damages sustained by him, in consequence therof, including the sum paid in order to recover possession of the animal, as prescribed in the last section; and, in addition thereto, the sum of twenty dollars for each animal seized.

§ 3100. **Action by petitioner and by officer.**—Where the possession of an animal has been delivered, as prescribed in the last section but one, an action may also be maintained, by the petitioner in the special proceeding before the justice, against the person who committed the willful act, to recover, in addition to all other damages sustained by the plaintiff in consequence of the willful act, all sums, to which the plaintiff would have been entitled out of the proceeds of the sale, as prescribed in section three thousand and ninety-two of this act, other than the compensation paid for the care and keeping of the animal. In the like case, if the petitioner is a private person, the officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section twenty-eight hundred and seventy-five of this act, may maintain an action against the person, who committed the willful act, to recover the penalties to which the plaintiff would have been entitled, out of the proceeds of the sale, as prescribed in that subdivision. Neither of the actions specified in this or the last section is affected by the pendency of, or the recovery of judgment in, either of the others.

§ 3101. **Demand of possession after final order and before sale.**—A person, entitled to demand the possession of an animal, as prescribed in section three thousand and ninety-seven of this act, who did not appear upon the return of the precept, or upon the trial, may file, with the justice, a written demand of the possession, at any time after the final order, and not less than three days before the time appointed for the sale; and, thereupon, he is entitled to the possession, upon complying with the following terms:

1. He must furnish, by affidavit or other competent evidence, a sufficient excuse, to the satisfaction of the justice, for his failure to appear.
2. He must, in all respects, comply with the provisions of section thirty hundred and ninety-seven of this act, except that it is necessary for him to pay only one-half of the justice's fee, as prescribed in subdivision second of that section, and one-half of the fees payable to the petitioner, for the seizure of each ani-

mal, as prescribed in subdivision third of section thirty hundred and ninety-two of this act.

§ 3102. Order upon demand of possession; appeal therefrom.—Where a demand for the return of the possession of an animal is filed, as prescribed in either of the last five sections, the justice must, at the request of either party thereto, make, and enter in his minutes, an order determining the same. An appeal from such an order may be taken to the county court, by the person making the demand, or by either party to the special proceeding, at any time before the final order in the special proceeding is made; and each person or party so entitled to appeal, must be made a respondent upon an appeal taken by one of the others. The appeal must be taken in like manner, as an appeal from a judgment of the justice in an action to recover a chattel; and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

§ 3103. Id.; stay of proceedings.—An appeal from an order, specified in the last section, is not effectual for any purpose, unless the appellant procures from the county judge, an order directing a stay of the proceedings upon the petition, and a stay of the execution of the order appealed from, and files it with the justice, within the time allowed for the appeal. The order may be granted or refused, in the discretion of the county judge, or granted upon such terms, as to security or otherwise, as he thinks proper; and it may be vacated or modified, either absolutely, or unless further security is given, in his security.

§ 3104. Appeal from final order.—Within ten days after a final order upon a petition is made, as prescribed in this title, an appeal therefrom may be taken by the petitioner, or by the person answering, in like manner as an appeal from a judgment of the justice in an action to recover a sum of money, equal to the value of the animal or animals, and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

§ 3105. Id.; by claimant; stay of proceedings and delivery of possession.—An appeal from a final order, taken as prescribed

in the last section, by the person answering, is not effectual for any purpose, unless the appellant files, with the notice of appeal, an order of the county judge, or, if he is absent from the county, of a justice of the supreme court, reciting that the appeal has been perfected, and that security has been given thereupon, as prescribed in this section, and directing a stay of proceedings upon the final order appealed from, and that the possession of the animal or animals seized be delivered to the appellant. The order can be made only where an undertaking is given by the appellant, as required for the purpose of perfecting an appeal from a judgment, and staying the execution thereof; and also an undertaking, in the same or another instrument, to the effect that, if the final order appealed from is affirmed, or if the appeal is dismissed, the appellant will pay all sums which the justice awards against him, upon the hearing after the determination of the appeal, as prescribed in the next section, not exceeding a sum specified therein, which must be, at least, twice the amount of all the sums, which might be deducted from the proceeds of the sale, as prescribed in section thirty hundred and ninety-two of this act. The sum must be fixed, and the undertaking must be approved, by the judge who grants the order. Upon filing the order with the justice, the appellant is forthwith entitled to the possession of the animal or animals seized.

§ 3106. Proceedings upon affirmance.—If the final order appealed from is affirmed, upon an appeal taken by the person answering, the county court must appoint a time and place, at which the justice must fix the sums payable by the appellant, pursuant to his undertaking. The justice may adjourn the hearing to another place, and to another time, not exceeding three days after the time so appointed. The justice must fix the sums so payable, as if a warrant for the sale of the animals seized had been returned, and the proceeds thereof paid to him by the constable, as prescribed in section thirty hundred and ninety-two of this act. The undertaking upon the appeal insures to the benefit of each officer, to whom any sum is payable, as prescribed in that section; and with respect to any of those sums the respondent is a trustee for the officer entitled thereto.

§ 3107. Limitation of action for seizing animals.—When an animal is seized, upon the ground that it was running at large, or was being herded or pastured, or was trespassing, contrary to the provisions of this title; and the officer or other person making the seizure, immediately files his petition, and diligently prosecutes the same, as prescribed in this title; an action to recover the animal so seized, or to recover damages for the seizure, or for any act subsequent thereto, must be commenced within one year after the cause of action accrues.

§ 3108. Certain actions cannot be maintained.—A person, to whom the precept was directed by his name, and who was personally served therewith, or a person who has appeared and answered in the special proceeding, or demanded the return of any animal seized, cannot maintain an action against the officer or other person seizing an animal, or a person acting by his command, or in his aid, in a case specified in the last section. But, except as specified in this section, the owner of an animal seized or detained, under color of any provision of this title, may maintain an action to recover the animal, or its value, or damages, for the seizure or detention, or for any unlawful act subsequent thereto, if, in fact, the animal was not, at the time of the seizure, running at large, or being herded or pastured, or trespassing, as the case may be, as specified in the foregoing provisions of this title.

§ 3109. Where several animals are trespassing, damages are entire. Proceedings in such cases.—For the purpose of determining the damages sustained by the petitioner, where two or more animals are found simultaneously trespassing upon real property, owned or occupied by him, all the damage done by all the animals seized, is to be regarded as done by them jointly; and the petitioner's remedy therefor is entire, and must be enforced against all the animals, and the proceeds of the sale thereof. Where different persons, who are known, own different animals seized, the precept must be directed to all of them by their names. If one or more of the owners are known, and the others are unknown, and cannot be ascertained with reasonable diligence, the precept must be directed to each known owner, by his

name, and, also generally to all persons having an interest in those animals, the owners of which are unknown. In a case specified in this section, a demand of the possession of an animal seized cannot be made, as prescribed in section thirty hundred and ninety-seven or thirty-one hundred and one of this act, unless it is made with respect to all the animals seized, and by persons entitled to the possession of all of them. But a separate demand may be made, as prescribed in section thirty hundred and ninety-eight of this act, by each owner of one or more animals seized; in which case, if possession is delivered to him, as prescribed in that section, the petitioner's remedy for his damages is the same, with respect to the animal or animals, of which possession is not so delivered, and against the proceeds of the sale thereof, as if those, whereof possession is so delivered, had not been trespassing upon the property.

§ 3110. Proceedings in other cases, where there are different owners.—Where the petitioner does not allege that the animals seized were trespassing upon real property owned or occupied by him, and different persons own different animals seized, a separate special proceeding may be instituted, as prescribed in this title, against each owner, or against any two or more owners, with respect to the animals owned by him or them. Or the proceedings may be taken against all the owners jointly; in which case, each person to whom the precept is directed by his name, and each person having an interest in an animal seized, has the same right to demand the possession of the animal owned by him, and the same right to answer separately, as if the special proceeding was against him separately; and the final order may be in favor of one or more of the persons so answering, with respect to the animal or animals owned by him or them, and for his or their costs; and against the remainder of the persons answering, or to whom the precept was directed, or for the sale of the remainder of the animals, in like manner, as if the former persons had not answered, or had not been named in the precept. But the person, first making a demand of the possession of any animal seized, must pay all the costs to the time of the demand; and a person, subsequently making a de-

mand, is excused from the payment of any costs, except those which have accrued since the former demand.

§ 3111. Surplus where there are different owners.—Where proceedings are taken jointly against different persons, who own different animals seized, as prescribed in either of the last two sections, the surplus, remaining in the justice's hands, must be distributed between them, in proportion to the value of the animals owned by each, to be determined by the justice. Any owner may claim separately his proportion of the surplus; and sections thirty hundred and ninety-three and thirty hundred and ninety-four of this act apply to a claim made, and to the disposition of the surplus arising, as prescribed in this section.

§ 3112. When one action, etc., supersedes any other.—Where two or more persons, or an officer and a private person, are authorized, by this title, to bring an action, or to seize an animal, and take the proceedings prescribed in this title for the disposition thereof, the commencement of an action, or the seizure of the animal, by either of them, supersedes the right of any of the others to bring such an action, or to make such a seizure, with respect to the animal seized, or in question in the action. But the justice may, in his discretion, allow an officer or other person, who is interested in the recovery, or in the application of the proceeds of the sale, to appear in the action or special proceeding, for the purpose of protecting his interest, and to take such part in the proceedings therein as the justice thinks proper.

§ 3113. Rights of officer when private person fails to prosecute.—Where a seizure is made by a private person, as prescribed in this title, and the possession of an animal seized is abandoned by him, without filing a petition; or where an action, brought by a private person, as prescribed in this title, is settled or discontinued by the plaintiff; the officer, to whom a penalty is payable, as prescribed in section thirty hundred and eighty-three of this act, or in subdivision fourth of section thirty hundred and ninety-two of this act, may, unless he has assented to the abandonment, settlement, or discontinuance, maintain an action against the owner of the animal in question, to recover

the penalty so payable to him; and, upon proof of the facts, which would have entitled the plaintiff in the former action, or the petitioner in the special proceeding, to recover, he is entitled to judgment accordingly.

§ 3114. Person having a special property deemed owner.— When a person is, at the time of the seizure, entitled to the possession of an animal, as against the general owner thereof, by virtue of a special property therein, he is deemed, for all the purposes of this title, the owner thereof.

§ 3115. Agent may act for his principal.— The duly authorized agent of the owner or person entitled to the possession of an animal, as specified in the last section, may, in his own name, answer, make any demand, or take any other proceeding, which the owner or person so entitled may take, as prescribed in this title.

CHAPTER XI.

Provisions of Canal Law Relating to Highways and Bridges.

(Canal Law [L. 1804, ch. 338] Article VII.)

- Section 110. Alteration of roads.
111. Farm and road bridges.
112. Commutation for bridges.
113. Private road in lieu of bridge.
114. Iron bridges.
115. Models and location of bridges.
116. Restriction on the construction of farm and road bridges.
117. Construction of bridges by municipal corporations.
118. Construction of lift, hoist or swing bridge by city.

§ 110. **Alteration of roads.**—If the superintendent of public works, or assistant superintendent having charge of the work, deems it necessary to discontinue or alter any part of a public road, because of its interference with the proper location or construction of any work on the canals, either of construction, repairs or improvement, he shall direct such discontinuance or alteration to be made, and file an accurate description of the part of such road so discontinued and laid out anew in the office of the town clerk of the town in which the same is situated; and from the time of filing such description, such road shall be so altered.

The passage of the part of such road so discontinued or altered shall not be obstructed until such superintendent or his assistant opens and works the part of such road so laid out anew, as to render the same passable. The written certificate of a justice of the peace of the county in which such road is situated that the part so laid out anew has been so opened and worked, shall be sufficient evidence thereof. Every alteration made by any engineer on any public road upon either of the canals before the first day of January, 1828, shall be deemed valid in law from the time of such alteration.

§ 111. **Farm and road bridges.**—The superintendent of public works is authorized and required to construct and hereafter maintain, at the public expense, road and street bridges over the canals, in all places where such bridges were constructed prior to the 20th day of April, 1839, if, in his opinion, the

public convenience requires that they should be continued, whether theretofore maintained at the expense of the state or of the towns, villages and cities where they are situate.

The superintendent is authorized to construct farm bridges over such canals when the same, in his opinion, are reasonably required, having reference to the accommodation of the owners of the land and a due regard to economy to the state and the convenience of navigation. But this provision does not abridge the power of the superintendent in relation to streets, roads and bridges as prescribed by law on the date above specified.

When a farm bridge is constructed in lieu of one theretofore maintained by the owner of the land and damages are claimed by such owner for the appropriation of lands or other injury done in the enlargement of the canals, the benefit derived by the owner by being relieved from the expense of maintaining the farm bridge over the canal shall be set off against any damage so claimed.

§ 112. Commutation for bridges.—The superintendent of public works may commute with owners and claimants of bridges over any canal, by paying such owner or claimant such sum in lieu of a bridge as may be agreed on between the claimant and the superintendent. If, in the opinion of the superintendent, a bridge should not be rebuilt, and the amount to be so paid be not agreed upon, the bridge shall not be built, but the damages sustained by such owner by being deprived of such bridge, and which the state under all the circumstances ought of right to pay, shall be ascertained in the same manner as damages for the appropriation of real property for the use of the canals, and paid by the superintendent. If the damages be claimed for the deprivation of a bridge which the claimant had before constructed or maintained, the circumstance of his being equitably bound to contribute proportionately towards the construction and maintenance of an enlarged bridge shall be taken into consideration and a proper amount on that account shall be set off against any damage to which the claimant might otherwise be entitled.

§ 113. Private road in lieu of bridge.—If the superintendent of public works can not agree with the owner of a farm bridge over a canal, as to the amount of commutation, in any case where such superintendent is of opinion that the state should erect such bridge, and such superintendent determines that a private road through adjoining lands will sufficiently accommodate such owner and that the same can be laid out with economy to the state, he may apply to the commissioners of highways of the town to lay out a private road for the accommodation of the owner, in the manner prescribed by law for laying out private roads, and pay to the owner of the lands through which the same is laid out the damages assessed.

§ 114. Iron bridges.—When the construction of an iron bridge over a canal is ordered by the legislature, or required by the superintendent of public works, the state engineer shall prepare a plan and general specifications for the construction of such bridge and submit the plan to the canal board. On obtaining the certificate of adoption by the canal board he shall file the plan so approved in his office and a copy thereof in the office of the superintendent of public works, who shall then advertise for proposals for the work, and award the contract to the lowest responsible bidder.

§ 115. Models and location of bridges.—No bridge shall be constructed across any canal without first obtaining for the model and location thereof the written consent of the superintendent of public works or of a superintendent of repairs upon that line of the canal which is intersected by the road or highway of which the bridge is to be a part.

Every person undertaking to construct or locate any such bridge without such consent and placing any materials for that purpose upon either bank of the canal or upon the bottom thereof, shall forfeit to the state the sum of fifty dollars, and the superintendent of public works or any assistant superintendent, superintendent of repairs or engineer may remove all such materials as soon as they are discovered, wholly without the banks of the canal.

§ 116. Restriction on the construction of farm and road bridges.—A person shall not be entitled to demand a farm bridge across a canal or feeder where the necessity or convenience of such bridge shall have arisen from the division or acquisition of property subsequent to the location of such canal or feeder. A street or road bridge shall not be constructed by the superintendent of public works over a canal or feeder, except upon such streets or roads as were laid out, worked or used previously to the construction of the canal or feeder by which such street or road was or is obstructed; and when bridges are constructed or reconstructed upon any such streets or roads, the cost to the state shall in no case be more than is required to preserve in a safe and substantial manner the continuity of such streets or roads so as not to unnecessarily impair their usefulness.

When a bridge of a more costly nature is desired by the local authorities of a city, town, or village within whose corporate limits a bridge is to be built or rebuilt, the superintendent of public works, on presentation to him by such local authorities of plans and specifications for such bridge, approved by the state engineer, shall estimate and determine the proportion of the cost, which, in order to preserve the continuity of such streets and roads, the state ought equitably to pay, and file such estimate and determination in his office and a duplicate thereof in the office of the clerk of such city, town or village, and no more than such proportion of the cost shall be appropriated by the legislature for such purpose, and then only on condition that such city, town or village shall pay the remainder of such cost. If a private road or public highway is laid out by legal authority in such direction as to require the erection of a new bridge over a canal for the accommodation of the road, such bridge shall be so constructed and forever maintained at the expense of the town or city in which it shall be situated.

§ 117. Construction of bridges by municipal corporations.—A town, village or city upon the line of any canal, at its own cost and expense, with the consent and under the direction of the superintendent of public works, may erect and maintain at any point within its limits, where a bridge is not maintained by the

state, such bridge across such canal, of such kind, dimensions and materials, and with such approaches as such superintendent approves, at the proper cost and expense of such town, village or city, at any point where there is not now a bridge built and maintained by the state. If such bridge shall be a hoist, lift or swing-bridge, and requires the constant attendance of bridge tenders to manage and work it, the superintendent may appoint and remove such bridge tenders as he deems necessary, and the expenses and wages thereof shall be paid to the superintendent by such town or village when he may require it, to be paid by him to such bridge tenders, and all the cost of material, power or tools necessary for the tending of such bridge shall be paid for by such town or village on demand therefor by the superintendent.

§ 118. Construction of lift, hoist or swing-bridge by city.—
The common council of any city may provide by ordinance for the erection of a lift, hoist or swing-bridge over a canal at any street in such city, and, if the superintendent of public works consents to such erection, in writing, filed with the clerk of such common council, may levy and assess the cost of the construction of such bridge on the property benefited thereby. Such bridge shall be built, operated and maintained under the supervision and control of such superintendent, but at the expense of such city or of the property adjudged by the common council thereof to be so benefited.

CHAPTER XII.

Miscellaneous Acts.

1. State roads; New York and Albany Post Road.
2. Widening highways.
3. Construction and improvement of roads and bridges in certain towns and counties.
4. Employment of convicts on highways.

1. State roads; New York and Albany Post Road.

L. 1817, Ch. 83.—“An act relative to state roads.”

WHEREAS great inconvenience has arisen from the want of authority in the commissioners of highways, of the several towns in this state, to alter and amend such highways as are laid out by special acts of the legislature, commonly called state roads; and in order to prevent application being made to the legislature for every alteration in said roads, as are supposed to be necessary—Therefore,

BE it enacted by the people of the State of New York, represented in Senate and Assembly, That it shall be lawful for the commissioners of highways of any town in this state, through which a state road passes, on being applied to by twelve free-holders of such town, and with the consent of the commissioners of highways of the adjoining towns through which said road passes, to regulate and alter such road, in the said town, if in their opinion the public good and convenience shall require the same: Provided, however, That no such alteration shall alter the general route of the road: And also, That the provisions of the act, entitled “an act to regulate highways,” relative to the alteration and amendment of public roads, shall be held to extend to such alteration, as aforesaid, of any state road.

L. 1806, Ch. 423.—“An act to preserve forever the New York and Albany post road as a state public highway.”

§ 1. The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany post road, shall be a public highway for the use of the traveling public forever.

§ 2. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel.

§ 3. No trustees of any village or corporation of any city upon its route, or board of commissioners of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect.

§ 4. This act shall not apply to any portion of said road within the city of New York, nor shall it apply to the road of the president, directors and company of the Rensselaer and Columbia turnpike, nor to the town of Cortlandt or the village of Sing Sing, in Westchester county. (Amended by L. 1900, chap. 576.)

2. Widening Highways.

L. 1893, Ch. 607.—“An act to provide for the widening of highways.”

Petition; commissioners to be appointed.—§ 1. When any part of a highway in any town of this state, not in an incorporated village or city, running between two or more villages or cities, has, because of the wearing away by a river or stream or any other natural cause, become narrower than the width required by statute, and is dangerous to the users of such highway, twelve or more resident taxpayers of such town may present a petition to the county court of the county within which such town is situated. The petition shall describe the part of the highway proposed to be widened and state that such highway has become lessened in width by the action of a river or stream or other cause, that it is dangerous to the traveling public, that the widening and improvement of such highway is necessary for the public convenience and welfare, that the highway is an important leading road between two or more cities or villages, that the cost of such widening and improvement would exceed the sum of two thousand five hundred dollars and would be too

burdensome on the town or towns otherwise liable therefor. Such petition shall be verified by at least three of the petitioners. On receipt of the petition the county court shall forthwith appoint three commissioners who shall not be named by any person interested in the proceedings and who shall be taxpayers of such county, but who shall not reside in the town or towns in which the highway, proposed to be widened and improved, is situated.

Commissioners; powers and duties of.—§ 2. The commissioners shall take the constitutional oath of office and appoint a time and place for a meeting to hear all persons interested in the proposed widening of the highway. They shall personally examine the part of the highway proposed to be widened, hear any reasons for or against such widening and ascertain the probable cost of the work. They shall have power to issue subpoenas, administer oaths and examine witnesses; they shall keep the minutes of their proceedings and reduce to writing all oral evidence given before them. They shall make duplicate certificates of their decision, filing one in the town clerk's office of the town in which the said highway is located, and the other, with such minutes and evidence, in the county clerk's office of the county where the highway is located. Such commissioners shall have the same power as to the assessment of damages caused by the widening of such highway as commissioners appointed under article four of the highway law for the discontinuance, alteration or laying out of a highway, and as to such assessment the same proceedings may be had for the confirmation, vacating or modifying of such decision, as provided in and by said article four of said highway law. The commissioners shall receive a compensation of five dollars for each day necessarily spent in the performance of their duties under this act, and the amount so paid to the said commissioners shall be a charge upon the town or towns in which the highway proposed to be widened as aforesaid is located.

Notice of decision; cost to be apportioned.—§ 3. If a majority of the commissioners shall determine that the proposed widen-

ing of the highway is necessary and that the cost thereof would be too burdensome for the town, exceeding in probable cost two thousand five hundred dollars, they shall notify the board of supervisors of the county of such decision. The board of supervisors shall thereupon cause one-half of the amount of the estimated cost to be raised by the county and paid to the commissioners of highways of the town or towns in which that part of the highway proposed to be widened as aforesaid is located, and said commissioners of highways shall apply the sum so received by them towards the payment of the cost of such widening. The balance of the expense shall be raised in the manner provided by law, by the town or towns in which that part of the highway proposed to be widened as aforesaid is located.

Construction; payment.—§ 4. The said commissioners of highways shall construct such widening of the highway according to plans and specifications adopted by them and approved by the town board of their town. The bills and expenses incurred in such work shall be audited by the town board and paid by the commissioners of highways out of moneys raised for such purpose as provided in the preceding section.

Actions to compel widening.—§ 5. In case an action might lie in any court of this state against the commissioners of highways of any town to compel such commissioners to widen a part of a highway, the width of which has become less than that required by statute, or in case an action has been brought against such commissioners to compel them to widen a part of a highway, the width of which has become less than that required by statute, the presentation of a verified petition to the county court as provided for in section one of this act shall prevent the commencing of any such action as aforesaid and cause such an action already commenced to cease, and shall be a bar to a recovery on the part of the plaintiff of a judgment against such commissioners of highways in any such action instituted or prosecuted to judgment after the passage of this act.

3. Construction and improvement of roads and bridges in certain towns and counties.

L. 1895, Ch. 499.—“An act to authorize certain town boards and commissioners of highways to expend a sum of money in addition to that authorized by the highway law, and to incur an indebtedness for the grading, macadamizing and improving of highways in said town.”

Purchase of stone for highways.—§ 1. The commissioners of highways, and the town board of any town of one thousand or less inhabitants adjoining a city having not less than thirty-five thousand inhabitants, which shall have been authorized by a majority vote of electors in said town by ballot at the last annual election in said town, to expend a sum not exceeding twenty thousand dollars, in addition to the sum authorized to be expended by section seven, article one, chapter nineteen of the general laws, known as the highway law, for the purpose of purchasing stone, and quarrying, breaking, crushing and spreading the same upon the highways in said town, and defraying the expenses incidental thereto, are hereby authorized, jointly, to proceed with the said work so authorized by said vote.

Issue of bonds therefor.—§ 2. And the town board of any such town is hereby authorized to pledge the faith and credit of said town to the extent and amount of such bond or bonds, and the sum to bear interest at a rate not to exceed five per cent. per annum, to be for such amounts and upon such terms and conditions as may be determined by the said board. Said bonds, when issued, shall be binding on the town, and shall contain a recital that they are issued under the provisions of this act, and said recital shall be conclusive evidence in any court of the validity thereof, and of the regularity of their issue. But the said bonds shall be payable within twenty years from the date of their issuance. Each bond shall be signed by the supervisor of the said town and countersigned by the town clerk, and delivered to the supervisor of the said town, who shall advertise the same for sale at public auction to the highest bidder, after one publication at least in one of the newspapers published in

the county seat of the county in which such town is situated, at least two weeks before the date of the sale. No such bond shall be sold for less than the par value thereof. All such bonds shall be numbered consecutively, and a record thereof kept of each by the town clerk and supervisor, showing the date, amount and date of maturity of each. All moneys to be derived from the sale of bonds shall be kept in a separate fund by the supervisor, and all orders for the payment of such moneys shall be drawn only by the authority of the town board, signed by the supervisor of the town, and countersigned by the town clerk. Before the supervisor shall advertise any such bond, he shall execute to such town, and file with the town clerk a special bond, with sufficient sureties, to be approved as to its form and sufficiency, by a majority of the town board, exclusive of the said supervisor, conditioned for the faithful execution of his duties in reference to the sale of said bonds, and applications of the proceeds under the direction of the said town board. At any time, when in the opinion of a majority of the members of such town board the moneys entrusted to such person as supervisor shall be deemed unsafe, or the surety insufficient, they may require a new and further bond, with like conditions as the first, and in such penalty and with such sureties as they may deem requisite and proper. Should default be made in the giving and filing of the bond as herein provided for, within the time limited herein, or if the supervisor neglect to renew his bond as last herein-before provided for, the town clerk, at the request of the said board, shall cause a written notice to be served upon the person so in default, requiring him to furnish such bond, or such renewal, as the case may be, within ten days from the day of service of such notice.

Work to be done by contract.—§ 3. The work done on the roads and highways under and by virtue of the provisions of this act shall be awarded to the lowest responsible bidder, who shall furnish security satisfactory to the majority of the town board and highway commissioners of the town. The said highway commissioners and town board of such town are authorized and directed to advertise for any and all work done under the pro-

visions of this act at least once a week for two weeks in a paper published in the county seat of the county in which such town is situated. Such advertisement for such work to be done shall contain a sufficient specification of the character and extent of the work to be done, and the places designated by a special town meeting in said town where the work is to be done.

L. 1890, Ch. 555.—“An act to provide for the improvement and maintenance of the public roads in certain counties as county roads.”

(This act being limited to counties of less than 200 square miles in area, only applies to Richmond and Queens counties, and is probably obsolete because such counties are wholly included in greater New York.)

L. 1897, Ch. 269.—“An act to provide for the construction and maintenance of bridges over the waters between cities and towns or incorporated villages in said towns.”

Construction of bridges.—§ 1. Whenever the highway commissioners having power in the premises under this act shall decide that the public convenience requires a bridge to be constructed over the stream or waters dividing a city from a town or any incorporated village in said town, the same shall be constructed under and according to the provisions of the highway law for the construction of bridges between towns, being article five of chapter nineteen of the general laws, the common council of the city being the highway commissioners of said city, and the board of village trustees of any incorporated village in the town being the highway commissioners of said village.

(This act only applies to certain towns in the county of Westchester, adjoining the city of New York. See § 5, post.)

Purchase of lands for approaches.—§ 2. Any land required for the approaches to said bridges for a distance not exceeding three hundred feet from the bridge, may be bought by the commissioners of highway constructing the bridge, the approaches constructed and the cost thereof included in the cost of the bridge.

Condemnation of land.—§ 3. When an agreement can not be made as to the price to be paid for the land for such approaches, the said land shall be condemned in the manner as provided by

chapter ninety-five, laws of eighteen hundred and ninety, with the acts amendatory thereof. The expenses of said condemnation proceedings shall be included in and be a part of the cost of the bridge.

Issue and sale of bridge bonds.—§ 4. In order to pay for the said bridges, the city and town shall each have the power to issue bonds, to be known as bridge bonds of the said city and town, respectively, by the officers thereof, and in the manner provided by law for the issue of other bonds of said city and of said town, to an amount necessary to pay their respective proportions of the cost of said bridges, which shall be borne by said city and town in the proportion of their equalized assessed valuation of taxable property, at the time of the final resolution of said city and town, authorizing the construction of the said bridges. The total amount of such bonds to be issued by the city shall not exceed seventy-five thousand dollars, or by a town, twenty thousand dollars. Said bonds shall not be sold for less than the par value thereof, and accrued interest, if any; shall mature and be payable at a time not over thirty years from date; be of such denominations and bear such interest, not exceeding five per centum per annum, as the common council of the city, in case of a city, or the town board, in case of a town, shall determine. The proceeds of the said bonds shall be paid to the proper officer for receiving funds of each municipality, and credited to a fund which shall be known as the bridge fund, and shall only be paid out by warrants, as other funds of said city or town are paid out. (Amended by L. 1898, chap. 591; L. 1899, chap. 232 and L. 1902, chap. 301.)

Application of act.—§ 5. This act shall apply only to towns from which at least one-quarter of the territory thereof has heretofore been taken for park purposes, and which also adjoin a city containing at the time of the taking of the last federal census a population of one and one-half million.

L. 1895, Ch. 611.—“**An act in relation to certain highways in towns which have expended three hundred thousand dollars or more for macadamizing purposes.**”

Section 1. Whenever the commissioners of highways of any town, in which during the past ten years there has been expend-

ed the sum of three hundred thousand dollars, or more, for the purpose of macadamizing the highways of such town, shall by a majority vote of such commissioners, determine that any portion of any highway or street, not within the limits of an incorporated village, which is the terminus of such street or highway, is unnecessary for highway purposes, the said commissioners may, by an order to be duly entered upon their minutes, order such highway to be discontinued and abandoned for public purposes. Provided, however, that no portion of such highway leading to tidewater, to be discontinued shall be greater than ten hundred feet of the terminus thereof, and that the owners of the land on both sides of such highway or street, for the distance it is proposed to discontinue the same shall, by written petition to such highway commissioners, have requested the discontinuance thereof. (As amended by L. 1902, chap. 331 and L. 1903, chap. 643.)

Description of highways abandoned to be filed.—§ 2. Immediately upon making and entering the order mentioned in the first section of this act, the said commissioner shall cause a written description of that portion of the street or highway ordered to be discontinued, to be filed and recorded in the office of the town clerk of the town in which the same said street or highway is located, and when the same is duly recorded, the said portion of the said street or highway shall thereupon be and become duly abandoned and discontinued for highway purposes.

L. 1896, Ch. 464.—“An act to provide for payment of damages sustained by reason of discontinuance and closing of highways under chapter six hundred and eleven of the laws of eighteen hundred and ninety-five.”

§ 1. Any person or corporation interested as owner or otherwise in any lands and claiming any loss or damage, legal or equitable by reason of the discontinuance, abandonment or closing of any street or highway, not within the limits of an incorporated village, under or pursuant to the provisions of chapter six hundred and eleven of the laws of eighteen hundred and ninety-five or of any act amendatory thereof or supplemental

thereto, may, upon ten days' written notice to the highway commissioners of the town in which such lands are situated, apply to the supreme court or to the county court of the county within which such lands are situated for the appointment of commissioners to estimate and determine such loss and damage; whereupon the court shall appoint three disinterested commissioners of appraisal to estimate and determine such damage, and the amount of compensation to be paid by said town therefor, who shall make their report thereupon to such court, and which report when finally confirmed shall be final and conclusive in respect thereto and the legality and equity of any and all such claims shall be determined by such commissioners and by the court upon the hearing of their report.

§ 2. Any loss or damage so estimated and determined shall be paid by said town as in case of judgment.

4. Employment of convicts on highways.

L. 1894, Ch. 266.—“**An act to provide for the employment of state prison convicts upon the public highway, and repealing chapter three hundred and twelve of the laws of eighteen hundred and ninety-three.”**

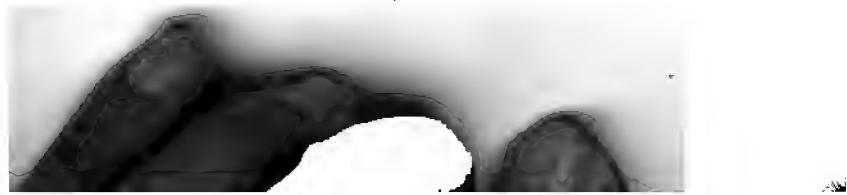
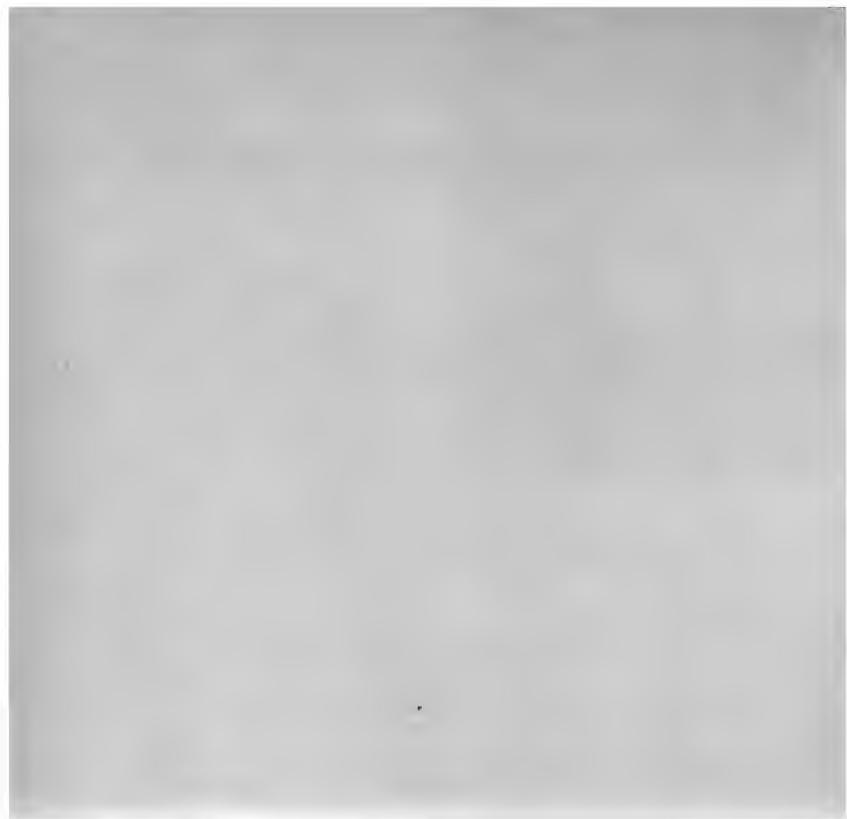
§ 1. The superintendent of state prisons may employ or cause to be employed, not to exceed three hundred of the convicts confined in each state prison in the improvement of the public highways, within a radius of thirty miles from such prison and outside of an incorporated city or village.

§ 2. The agent and warden of each prison may make such rules as he may deem necessary for the proper care of such prisoners while so employed, subject to the approval of the superintendent of state prisons.

§ 3. The agent and warden of each prison may designate, subject to the approval of the superintendent of state prisons, the highways and portions thereof upon which such labor shall be employed; and such portions so designated and approved shall be under his control during the time such improvements are in progress, and the state engineer and surveyor shall fix the grade and width of the roadway of such highways and direct the manner in which the work shall be done.

§ 4. The superintendent of state prisons is hereby authorized to purchase any machinery, tools and materials necessary in such employment.

§ 5. Any person interfering with or in any way interrupting the work of any convict employed pursuant to this act, upon the public highways, or any person giving or attempting to give any intoxicating liquors, beer, ale or other spirituous beverage to any state prison convict so employed, shall be guilty of a misdemeanor. Any officer or keeper of any state prison having in charge the convicts employed upon such highways, may arrest without a warrant any person violating any provision of this section. (Inserted by L. 1894, chap. 664.)



APPENDIX.

DIRECTIONS FOR THE GUIDANCE OF HIGHWAY COMMISSIONERS IN TOWNS THAT HAVE ADOPTED THE MONEY SYSTEM OF WORKING HIGHWAYS.

PREPARED BY
HENRY A. VAN ALSTYNE,
State Engineer and Surveyor for the State of New York.

1. The laws enacted by the Legislature of 1904 contain a number of important changes in the Highway Law of the State which I think advisable to bring before the Supervisors, Highway Commissioners and others interested in highway improvement.
2. The repair and maintenance of the 74,000 miles of public highways in our State is a matter of vital importance. The provisions of law as herein printed in full and which relate particularly to 31,000 miles of highways located in towns which have adopted the money system and also to 700 miles of roads which have been constructed and are being constructed pursuant to chapter 115 of the Laws of 1898, impose upon this Department a direct responsibility.
3. Among the other laws of 1904, sections 55-b and 55-c of the Highway Law, require the State Engineer to issue directions to the Highway Commissioners of the towns in which highways have been constructed pursuant to the provisions of chapter 115 of the Laws of 1898, and also to the Highway Commissioners of towns which have adopted the money system for the proper maintenance and repair of all of the roads in their towns.
4. In issuing these directions as required by said law, I desire to make known my readiness to assist the County Engineers or Superintendents of Highways, and the Highway Commissioners in effecting the greatest possible improvement of the highways under their charge with the means at their disposal. It should be our aim to perfect our plans, organization and

methods to such a degree as to get the best possible results with the funds now available, and then endeavor to obtain appropriations sufficient to maintain our highways in a satisfactory and creditable manner.

5. The roads of each county should be classified according to their relative importance and the amount and character of the traffic they are called upon to carry. I would suggest that two general classes be considered: First-class roads and second-class roads as authorized by section 55-a of the Highway Law.

6. First-Class Roads: Those comprising the main traveled roads of the county and leading to, or connecting, the principal centers of population: These roads should have their grades reduced to a maximum not exceeding six per cent; should have their drainage made as nearly perfect as possible, and should have their surface covered for a width of not less than twelve feet with macadam, gravel or other suitable material of sufficient thickness to carry the traffic without injury to the road surface. As rapidly as possible, this class of roads should be petitioned for by the boards of supervisors and improved under the provisions of chapter 115 of the Laws of 1898 known as the Higbie-Armstrong Act.

7. Second-Class Roads: These roads to consist of all other than those designated as first-class roads: They should be repaired and maintained under the provisions of sections 49, 50, 51, 52 and 53 of the Highway Law known as the Fuller-Plank Act or the "Money System." For the purpose of assisting in making this classification, maps showing the roads in each county will be furnished to County Engineers or Superintendents of Highways, Supervisors and Highway Commissioners upon request, and without charge.

DIRECTIONS.

8. The roads of each town should be divided into as many districts as may be necessary in order to have every mile of road placed in the best possible condition on or before June 1st of each year.

9. Each district should be placed in charge of a competent

foreman who should be provided with suitable tools, machinery and men to properly care for the roads under his charge.

10. As early in the Spring as possible all waterways, ditches and culverts should be opened, and the work of perfecting the drainage and improving the surface of the road should be commenced.

MAINTENANCE AND REPAIR OF EARTH ROADS.

11. The best grade and form and most perfect system of drainage for an earth road constitute the best preparation for a gravel or macadam road, should either of these surfaces be added at a later date. The steepest grades on a road limit the size of loads which can be drawn over the road. Effort should be made to reduce the steep grades by cutting the top of each hill and filling in at the foot. The gain thus made is best shown by the following results of tests by which it has been demonstrated that a pair of horses drawing a load of 4,000 pounds on a level road can only draw with the same effort—

3,600 pounds on a 1% grade or 1 foot rise in 100 feet.

3,200 pounds on a 2% grade or 1 foot rise in 50 feet.

2,880 pounds on a 2 1-2% grade or 1 foot rise in 40 feet.

2,160 pounds on a 4% grade or 1 foot rise in 25 feet.

1,600 pounds on a 5% grade or 1 foot rise in 20 feet.

12. In towns where the Highway Commissioners have been the most successful the following plan has been adopted:

13. Three teams are usually required to properly operate a road machine and progress the work fast enough so that those engaged in working the highways can occupy their time to the best possible advantage. In addition to this, one team and wagon with dump-box and field-drag or harrow should be provided and also four or five laborers. With this force the road should be brought to a proper crown, and loose stones, sod and organic matter should be immediately removed. On a basis of cost of \$4 per day for one team and driver, and \$1.50 a day for labor, the total cost per day would be as follows:

4 teams, at \$4 per day.....	\$16 00
2 laborers on machine, at \$1.50 per day.....	3 00
4 laborers following machine, at \$1.50 per day..	6 00
Total	\$25 00

14. A foreman thus equipped should be able to clean up and crown from two to three miles of highway on an average each day, and at a cost of from \$8.50 to \$12.50 per mile. The balance of the funds in the hands of the Supervisor subject to the order of the Highway Commissioner can then be used in the removal of stones every thirty days as provided by law, the cleaning of culverts and ditches, perfecting the drainage and improving the road-surface; and for such other repairs and permanent improvements as the Commissioner of Highways and the Town Board may determine and direct.

It has been suggested by some Highway Commissioners that late in the Fall it is desirable to plow the sides of the earth road between the wheel tracks and the ditch. If this is done, the sod will decompose during the winter months so that when the Highway Commissioner begins to work the road in the Spring, the vegetable matter is readily separated from the earth, and the amount of work that can be performed with a road machine is greatly increased, so that it would seem desirable to recommend such course.

15. None of the money which is annually raised by tax in the town for highway purposes, or which the town receives as State aid under the provisions of section 53 of the Highway Law, should be used for the purpose of paying the salary of the Highway Commissioner or Commissioners, which is provided for by section 178 of the Town Law.

16. None of the money which is annually raised by tax in the town for highway purposes, or which the town receives as State aid under the provisions of section 53 of the Highway Law should be used for the building or repair of bridges, which money shall be raised as provided by section 130 of the Highway Law, except where special laws or conditions prevail.

17. None of the money which is annually raised by tax in the town for highway purposes, or which the town receives as State aid under the provisions of section 53 of the Highway Law, should be used for the removal of obstruction caused by snow, which money should be raised as provided by section 21 of the Highway Law.

18. Section 53-a of the Highway Law provides that all owners and occupants of lands situate along a highway shall cut the noxious weeds and brush growing along the sides of the highway fronting their land, at least twice each year, once before the first day of July and again before the first day of September.

19. Section 20 of the Highway Law provides that all loose stones lying in the beaten track of every highway are to be removed once every month from the first day of April until the first day of December in each year. The attention of the Highway Commissioners is called particularly to the provisions of this law.

DRAINAGE OF EARTH ROADS.

20. One of the most important matters involved in the maintenance of any highway, whether earth, gravel, or macadam, is that of drainage. Water is the natural enemy of an earth road.

21. Three systems are used in the proper drainage of a road: Surface drainage, side-ditches and under-drains.

SURFACE DRAINAGE.

22. In forming the surface of the traveled way, care should be taken to keep it well crowned so that the water will quickly run off into the side-ditches. Under-drains are usually of no use in draining the surface of the road, for, in order to reach them, the water must first soften and then soak through the surface. The crown should not be so great that vehicles are compelled to keep in the center, as in that case the road will be worn hollow and surface water will be retained. In extreme cases of too much crowning it is sometimes difficult for vehicles to turn out in passing. Provided the road is properly maintained and the surface kept smooth, a crown of one inch to one foot is ample. More crown is required, however, on very steep grades, as the water in flowing from the center of the road to the sides travels diagonally and not at right angles to the center-line, as is the case on a level road. If the surface is too flat the water will follow down the center, the wheel tracks will become deepened, stones become loosened and the road surface made rough and dangerous. It should be remembered that sur-

face drainage depends largely on maintenance, and that in order to get the best results the surface should be kept smooth and free from ruts and holes or depressions.

SIDE DITCHES.

23. One of the principal causes of the poor condition of the ordinary dirt road is the lack of proper side-ditches. These ditches serve to carry off the surface water from the road and also to intercept the water from the adjacent side hills. In places where no tile drains are laid, the ditches also serve to drain the subgrade to a certain extent, although a tile drain is much more effective for this purpose. If the road has been properly under-drained, there is no necessity for very deep side ditches. The ditches should be of such form that all the rough work can be done by the road machine or scraper, care being taken to make the slope on the road-side flat enough to avoid accident to a vehicle should it be crowded off the traveled way. To be most effective, the side-ditches should be dug to a uniform grade and should have an unobstructed outlet into some stream if possible. Water should never be allowed to stand in the ditches for evaporation, but should be led away from the road as quickly as possible. It is also inadvisable to carry water for long distances, as damage from washing and scouring is sure to occur after a thaw or heavy shower. The ditches should discharge as soon as possible into the natural watercourses. It is often necessary to lead the water from the high to the low side of the road, and in doing so it is a common practice, especially on steep grades, to dig a gutter or build diagonally across the road a small dam commonly called a "Thank you ma'am." These are both objectionable methods and should never be used. The water should always be carried under the roadbed by means of culverts, the size being determined by the volume of water to be carried and by the fall in the culvert. Stone or concrete box-culverts are superior to pipe for this purpose as they are less liable to freeze or to become clogged and damaged, and are more easily cleaned. Stone flagging or concrete slabs supported by steel beams or rails should be used in preference to plank for covering culverts having less than eight or ten feet span.

CONCRETE SLABS.

Concrete slabs can be made in the following manner, viz:

Provide a mixing-bed eight feet wide and ten feet long formed of smooth boards laid close, or of sheet iron. Never mix mortar or concrete on the ground. Make an open box six inches deep, two to three feet wide and from three and one-half feet to four and one-half feet in length, as the span may require. Whenever the necessary width of opening exceeds three feet, I beams of steel must be used to span it, and these must be placed two to three feet between centers, this distance varying inversely with the width, and the slabs made to span this distance between the centers of the beams. Provide expanded metal of Gauge No. 4, formed of steel 3-16 inch thick, 5-16 inch wide, in meshes 6 inches wide and 12 inches long and weighing 1 1-10 pounds per square foot, and costing 5 cents per pound, and cut into sheets of sufficient size to nearly cover the proposed slabs, being careful that the 12-inch mesh crosses the span.

To make the concrete, use one part loose Portland cement, two and one-half parts sand and five parts broken stone or gravel not exceeding one inch in size, all being measured in loose bulk. If stone from a crusher is used, screen out the fragments larger than one inch, and use for the concrete all the product less than one inch, allowing the dust to act instead of one part of sand. If gravel is to be used and is not clean, it should be washed in running water until the water runs away clear. Before using any cement, blend the contents of several bags or barrels—about five—so that if one bag or barrel is poor it will be mixed with four good ones. Thoroughly mix the blended cement and the proper amount of sand before wetting; then add enough water to make a thin mortar which is not thin enough to run; dampen the broken stone or gravel; and then spread the proper quantity of the dampened stone or gravel upon the mixing bed in a 4-inch layer, and cover it with the mortar; mix thoroughly by turning with shovels while working with hoes until all fragments are coated with mortar. The mass thus formed should flatten and quake when put in a wheel-

The following table shows the sizes and weights of I beams which should be used to insure safety in culverts, when crossed by a ten-ton road roller. The figures in heavy type indicate the economical sizes to use. The lengths given are the clear spans or distances between the side walls. The I beams should be long enough to rest a foot on each wall. The spaces between and outside of the I beams on top of the side walls should be filled with concrete or masonry laid in cement mortar. If care is taken to fill with mortar the joints between the flagstones or concrete cover blocks, the I beams will last many years longer than they will if the drainage from the road is allowed to wet and rust them:

TABLE SHOWING SIZES AND WEIGHTS OF I BEAMS TO BE USED FOR VARIOUS LENGTHS OF SPAN FOR BRIDGES OR CULVERTS, USING STONE OR CONCRETE SLABS.

Depth of 1 beam. Inches.	Width of Flange in Inches.	Weight of 1 beam per foot of length. Pounds	Thickness of web of 1 beam. Inches.	LIMITING LENGTHS OF SPAN.	
				I beams spaced 2 feet be- tween centres.	I beams spaced 3 feet be- tween centres.
5.....	3	9 3-4	0.21	4 ft. 6 in.	3 ft. 6 in.
5.....	3 1-8	12 1-4	0.36	5 ft. 0 in.	4 ft. 0 in.
5.....	3 5-16	14 3-4	0.50	5 ft. 6 in.	4 ft. 0 in.
6.....	3 5-16	12 1-4	0.23	6 ft. 6 in.	5 ft. 0 in.
6.....	3 7-16	14 3-4	0.35	7 ft. 0 in.	5 ft. 6 in.
6.....	3 9-16	17 1-4	0.48	7 ft. 6 in.	6 ft. 0 in.
7.....	3 11-16	15	0.25	8 ft. 6 in.	7 ft. 0 in.
7.....	3 3-4	17 1-2	0.35	9 ft. 0 in.	7 ft. 6 in.
7.....	3 7-8	20	0.46	9 ft. 6 in.	7 ft. 6 in.
8.....	4	18	0.27	11 ft. 0 in.	8 ft. 6 in.
8.....	4 1-16	20 1-2	0.36	11 ft. 6 in.	9 ft. 0 in.
8.....	4 3-16	23	0.45	12 ft. 0 in.	9 ft. 6 in.
8.....	4 1-4	25 1-2	0.54	12 ft. 6 in.	10 ft. 0 in.
9.....	4 5-16	21	0.29	13 ft. 6 in.	11 ft. 0 in.
9.....	4 7-16	25	0.41	14 ft. 6 in.	11 ft. 6 in.
9.....	4 5-8	30	0.57	15 ft. 6 in.	12 ft. 6 in.
9.....	4 3-4	35	0.73	16 ft. 6 in.	13 ft. 6 in.
10.....	4 11-16	25	0.31	16 ft. 6 in.	13 ft. 6 in.
10.....	4 13-16	30	0.46	17 ft. 6 in.	14 ft. 0 in.
10.....	4 15-16	35	0.60	18 ft. 6 in.	15 ft. 0 in.
10.....	5 1-8	40	0.75	19 ft. 6 in.	16 ft. 0 in.
12.....	5	31 1-2	0.35	21 ft. 0 in.	17 ft. 6 in.
12.....	5 1-16	35	0.44	21 ft. 6 in.	18 ft. 0 in.
12.....	5 1-4	40	0.46	22 ft. 6 in.	19 ft. 0 in.
15.....	5 1-2	42	0.41	27 ft. 6 in.	23 ft. 0 in.
15.....	5 9-16	45	0.46	28 ft. 6 in.	23 ft. 6 in.
15.....	5 5-8	50	0.56	29 ft. 6 in.	24 ft. 6 in.

UNDER-DRAINS.

27. Artificial under-drainage should be used in soil in which there is no natural under-drainage; that is in any soil in which water lies in the ground at a depth of four or five feet or less below the surface. Generally speaking, road taxes cannot be spent to a better advantage than in properly under-draining a road built on clay or loamy-soil. There is a mistaken idea that the principal function of under-drains is to carry off the surface water. The most important objects of under-drainage are, first to lower the water level in the soil; and, second, to dry the ground quickly. The surface of the road is rapidly dried by the sun and wind; but if the foundation is wet and soft, ruts are soon formed in the road and these are filled with water by the first shower, leaving the surface muddy and full of holes.

28. Under-drains are also of great value in carrying off the water below the surface after a freeze and thaw. In the spring especially when the water below the road is released by thawing, the under-drains quickly carry it off and the foundation is left dry and firm. Frost is harmless to a road where there is no water beneath it, and by keeping the foundation dry, the road is prevented from being broken up in the spring.

29. Porous tile drain or vitrified pipe, six inches in diameter and laid from three to four feet below the surface, makes the best form of under-drain. The porous tiles, which usually come in lengths of about thirteen inches, should be uniformly burned, straight, round and smooth inside. The tile under-drain is better and more durable than any of the substitutes commonly in use, such as wooden box drain or open ditch filled with broken stone or logs and brush.

30. If the porous tiles have no hubs or collars to help hold them in place, care should be taken to keep the bottom of the trench but a little wider than the diameter of the pipes, or better still, a groove may be scooped out in the bottom of the trench to fit the tiles which should be laid with their ends in contact and with reasonably close joints. It is the general practice to wrap a piece of canvas or burlap around each joint to prevent fine particles of earth from being washed in at the joints.

31. If there are sags in a line of pipe, silt will accumulate at these points, retarding and finally stopping the flow of water. It is, therefore, important that the tiles should be laid to a true grade, especially if the drop is slight, and that they should also be laid in line both vertically and horizontally. It is not considered good practice to lay under-drains on a less grade than two inches on one hundred feet and a steeper grade should be secured wherever possible. Wherever the grade is less than three inches per hundred feet, or wherever the sub-soil is very unstable there shall be laid in the bottom of the trench, as a foundation for the tiles, boards one inch thick, three to four inches wide and 12 or more feet long, the ends being joined by nailing them to pieces beneath them. Tile has sometimes proved to be very effective when laid in this manner and nearly level; but in this case it is advisable to use a larger diameter of pipe at the outlet and to gradually decrease the diameter as the distance from the outlet increases in order to increase the fall.

32. It is often advisable to start the pipe line at a depth of two and one-half feet and to gradually increase the depth to four and one-half or five feet provided there is a good outlet at the deeper end. It is important, in any case, that the drain have a good, unobstructed outlet and that the end of the tile be protected by masonry or other means. It is customary to substitute at the exposed end three or four lengths of vitrified pipe for the porous tile as the end tiles soon become destroyed if left exposed to the elements. After the tile has been properly laid it should be covered with at least a foot of broken stone or clean gravel or cinders placed over and around it. The trench should then be filled with the most porous material available.

33. As a rule, it is better to place the under-drain under the side-ditch rather than under the center of the road. While a tile drain under the center of the road may be a little more effective than one placed under the ditch at the same elevation, it costs more to dig the trench for the former since it necessarily makes more excavation, and there is also a liability of the material in the trench settling and leaving a mudhole in the center of the road. If for any reason tile becomes stopped up, it is not only more expensive to dig it up but interferes with traffic,

when placed under the middle of the road. The disadvantages of this drain are increased if the road surface is ever gravelled or macadamized.

34. It is generally conceded that a line of tile of proper size placed under one side-ditch, at a depth of from three to four feet, will give sufficient drainage under ordinary circumstances. Local conditions, however, sometimes make it necessary to lay two lines of tile, as when the drains are laid very shallow on account of hardpan appearing near the surface, or when the first line put in has proved to be too small or is poorly laid. The tile should be laid on the side of the road which most needs drainage. If the ground on one side of the road is higher than on the other, the tile should be laid on the high side so that any water coming down the slope under the surface will be intercepted. The tile should also be laid so that it will take the water from any springs or small swamps adjacent to the road, as it is much better to drain these places than to raise the road above them by filling them in with earth. If any doubt exists as to whether one or two lines of tile is needed, it is a good plan to put in one line first and observe whether both sides of the road appear to be equally dry and, if not, the other line can be added if found necessary.

SURFACING EARTH ROADS.

35. Any road-surfacing material should be of the same quality and degree of hardness and durability throughout, so that the surface may wear evenly and remain smooth and free from hollows or depressions caused by traffic. Never under any circumstances, place on the surface of the road, sod, roots, any organic material, or any worn out dust or mud scraped from the ditches or sides of the road.

After the earth roads have been properly drained those having the most traffic or the poorest natural surfacing material should have their surface improved by placing thereon the best available material, not less than eight feet in width, nor less than six inches in thickness. When the natural road is of loose sand, this can be much improved by spreading over it a layer of clay or loam and allowing it to mix with the sand. Saw dust

is sometimes used with good effect on loose sand. When the natural road is of soft clay, a layer of sand or gravel will stiffen and bind it, and much improve it. Crude petroleum oil is used on the sandy roads of California in the rainless regions and produces excellent results, but it is probably not suited for use in a region of heavy rains even if its greater cost were not an objection.

GRAVEL FOR SURFACING.

36. Gravel should be the best which can be obtained in the vicinity of the road. The fragments of stone should be hard, tough and durable. Their size should not exceed one inch in greatest dimension, the larger stone should be screened out or raked off after placing on road and used in the foundation. Several sizes should be so proportioned that the smaller ones are just sufficient to fill the interstices between the larger ones, and the gravel should contain a sufficient amount of binding material to fill the remaining smaller interstices so as to form one solid impervious mass. The binding material may consist of clay, or loam which is clay mixed with sand and vegetable matter and has many of the characteristics of clay, sand, stone dust, or some material that is fine enough to fill all the voids and make the finished gravel surface impervious to water when properly drained, crowned and shaped.

37. The proportion of binding material should not exceed the amount required to fill the interstices. All in excess of this is only a damage to the road. In general the binding material should not form more than fifteen or twenty per cent of the total quantity of gravel used.

38. If the gravel as obtained from the pit is deficient in quantity or quality of binding material, a sufficient amount of the proper quality should be added. Should the gravel contain an excessive amount of binding material the excess should be screened or washed out. After the gravel has been spread to the proper width, thickness and shape, it should be rolled with a steam or horse roller and, if too dry, sprinkled before rolling.

39. Where the only available surfacing material is shale, only the hardest, toughest, and most durable varieties should be used, usually those containing the largest proportions of silica

or sand: Argillaceous shales which turn into clay when exposed to the elements under traffic, are worthless for road building purposes and should never be used. After spreading to the proper width, thickness, and shape, the surface should be covered with a layer of sand, fine gravel, or other proper binding material, and rolled with a steam or horse roller until a firm, smooth surface is obtained.

MAINTENANCE OF GRAVEL ROADS.

40. After a newly constructed gravel road has been thrown open to traffic it should be carefully watched in order that any defects may be remedied at once. Shallow ruts and depressions should be repaired without delay or serious damage will be the result. In repairing a new road the gravel on the sides of the depression can be raked back in place; but after a time it will become necessary to fill the depressions with new material. In the latter case the old hardened surface should be slightly loosened with rakes in order to get a bond between the old and the new material. The gravel used should be smaller in size and should also contain more binding material than that used in the construction. This material should be stored in piles along the road side, containing fifteen or twenty cubic yards each. Smaller piles are soon scattered and wasted.

41. Loose stones should be raked off the road surface as soon as they appear. They are uncomfortable for the traveling public, spoil the beauty of the road, and help to destroy it.

42. Care should be taken to immediately fill all the hollows and depressions in the center, made by the horses' feet, in order to avoid having water remain on the surface. If the gravel becomes saturated and soft it wears more rapidly and will soon rut. It is important that the crown of the road should be preserved and that water should not be allowed to run down the center, but should have an unobstructed flow to the side-ditches. In cases where the center has been worn hollow, the crown should be restored by adding the proper amount of suitable material. This work should be done when the road is wet and soft and the gravel will easily compact and bind together.

43. The ditches and culverts should be kept open at all times; and the rules for this work given under the instructions for the maintenance of macadam roads, apply with equal force to gravel roads.

MAINTENANCE OF MACADAM ROADS.

44. After a macadam road has been completed and opened to traffic, it is very important that the surface be kept smooth and free from depressions. It is a mistaken idea that when a stone road has once been properly constructed no further work is necessary. It is of the greatest importance that the completed road should receive constant care and attention in order that any defect which may appear, may be immediately repaired before serious damage is done.

45. There are several causes for the various defects appearing from time to time, one of the most serious of which is the picking by the calks of the horses' shoes. The constant pounding of the shoes tends to loosen the binding material and the exposed stone in the top course. A few stones loosened in this manner and pounded around by the impact of the wheels have a tendency to loosen others and at the same time to loosen the binding material which is the more quickly blown away and washed off by the rain. The effect of the horses' feet will be especially noticed on steep grades, and in the spring of the year when the horses are "sharp shod."

46. Serious damage soon results from the common practice of driving in the track made by preceding vehicles, especially with heavy loads on narrow tires. Ruts would scarcely, if ever, appear on a well constructed road if drivers would vary their track even only a few inches. It will be noticed that no matter how deep the rut, it will disappear when a sharp turn occurs as the horses vary their course around a corner and traffic spreads out over the full width of the road. This is one of the principal causes of deterioration of a macadam road, and could easily be remedied with a little care on the part of the drivers. In some parts of the country obstructions of various kinds are placed at intervals to divert the travel from a beaten path. These obstructions are moved occasionally so as to direct the traffic either in long parallel lines or from one side of the road to the

other in long easy curves. This method is objectionable however, except on wide roads.

47. In dry weather high winds often remove the binding material or screenings from the surface of the macadam and from between the fragments of stone in the top course. Ravelling will result at these places especially on less travelled roads, since the traffic is not heavy enough to wear off sufficient cementing material from the crushed stone to fill the voids thus left in the surface.

48. Violent rains frequently do considerable damage by washing the screenings from the surface and leaving it bare and free to ravel. This is especially noticeable on steep grades.

49. If the repairs have been neglected and the macadam surface has been allowed to become loosened and porous and the drainage defective, water will soak through the stone and damage will result from frost. If the road is kept smooth and hard no damage will result from this source, provided the road is properly drained, but if the foundation becomes saturated, frost will not only heave the road but will break up the bond of the macadam and leave it rough and soft. Many ruts occurring after the spring thaws are due to this cause.

50. The amount of wear on a macadam surface varies in different sections and is governed by the climatic changes and conditions, the character of the stone used, and the amount and kind of traffic to which the road is subjected. It has been estimated that twenty per cent of the wear is due to atmospheric causes and eighty per cent to traffic, and that six-tenths of the latter cause is due to the horses' feet and four-tenths to the wheels.

51. In the maintenance of stone roads it should be remembered that "A stitch in time saves nine" and that the work of repair should be commenced as soon as the frost goes out of the ground in the spring. One of the most serious difficulties encountered is "ravelling," or the tendency of one stone after another to work loose from the mass and come to the surface. This occurs chiefly in the spring when the screenings have become loosened and perhaps partly blown off the surface. This

may also occur on steep grades after the binding material has been largely washed off by heavy storms. Sprinkling is an effective remedy for ravelling but is impracticable on most country roads at the present time. It is used, however, on city, village and park roads and is the principal cause of their freedom from loose stones. Ordinarily the best remedy for ravelling on country roads is a coating of sand of proper quality, screenings or other suitable material, placed wherever the surface is bare or picked up. The loose stone should first be raked into piles on the roadside, then collected in wagons and hauled away. Generally these stones are worthless for patchwork as the corners have been worn off and the stone rounded, making it difficult to get a bond with them. As a rule, only the middle eight feet of the road need be re-covered, the sides of the road being well covered by the material washed and blown on them from the center. The sand to be used should be coarse and reasonably clean, although a small amount of loam is sometimes beneficial in compacting and cementing the surface. The material should be spread on evenly to the depth of from one-half inch to one inch. Too heavy a coating is inadvisable since it ruts under the wheels and prevents the water from flowing freely after a rain. This coating should be renewed as often as may be necessary.

52. Ruts sometimes appear in the macadam and are caused either by heavily loaded narrow-tired wagons, or by the common habit of tracking, already spoken of, or by the combination of both. Ruts are most liable to occur in the spring or after a long rain when the road is soft. Small ruts will sometimes disappear if the traffic is diverted to one side by barricades for a time. In serious cases it is necessary to either pick down the loosened stone on the sides into the depression, or to fill the rut with new material.

The former remedy will often give the best results on a new road. If the repairs have been neglected until long ruts or hollows have been allowed to form, considerable work will be required. These ruts or depressions should be repaired in short patches, leaving sections of the unrepairs road in between, until the patches have been consolidated by traffic. This

method is advisable as horses avoid long narrow stretches of stone and new ruts have a tendency to develop alongside the old ones.

53. In patchwork all screenings, dust and mud should first be thoroughly swept from the surface to be repaired and the old smooth surface slightly roughed up with picks. Broken stone of the same quality but a little smaller in size than the material used in construction should be used. The rut or holes should be filled with this material, care being taken to fill the loose stone a little above the old surface in order to avoid a depression after the stone has been properly consolidated. The loose stone should then be rolled until they are solid and firm in place. A steam roller is preferable but a horse-roller will do the work if used long enough; or if no roller is available, the mass should be tamped by a paving rammer until it is thoroughly consolidated. Screenings should then be swept into the stone until all the voids are filled and the patch should then be thoroughly sprinkled and again rolled or tamped. Unless the repairs are made in the spring when the macadam is soft, or during a rain, it is essential that water be used in repair work. If it is not used the stone will not bind together properly and will soon become loosened. Several light sprinklings are more desirable than one or two heavy flushings, as the latter will wash away the binding material from the stone.

54. If the ruts, holes or depressions are very frequent the macadam should be resurfaced with a layer of hard broken stone from one-half inch to one inch in size, three or four inches in thickness, properly filled with screenings and rolled as required in the standard specifications for macadam roads of this Department.

55. Considerable damage is often done to macadam roads by clay and loam being carried on the surface at intersections with unimproved cross roads. The clay or mud is brought on the improved road by the wheels and tends to pick up the sand from the top course, leaving a rough surface. This material is often carried along the road several hundred feet. Where this occurs the mud should be scraped off and a coating of suitable material substituted. It is also advisable to cover the dirt roads

with gravel or broken stone for a distance of two or three hundred feet from their intersection with a stone road in order that the undesirable material may be jarred off from the wheels before the macadam road is reached.

56. Heaving of the macadam in the spring as the frost goes out is caused by a poorly compacted and porous surface which lets the surface water into the stone, or by defective drainage. In either case it is necessary to secure a dry foundation. In extreme cases it may be necessary to lay tile under-drains, as described on page 408 under Drainage of Earth Roads, but ordinarily the defect may be remedied by cleaning and deepening the side ditches. It is sometimes effective to lay a line of porous tile under the macadam from the center of the road to the side ditches.

57. One of the most effective means of keeping a macadam road in good condition is a thorough rolling soon after the spring thaw. The roadbed at this time is wet and soft and in the most favorable condition for effective rolling.

58. The surface of the road should be kept at all times in such condition that the water can have an unobstructed flow into the ditches. Small depressions which allow water to stand should be filled up even with the surrounding surface with the smaller sizes of stone. The sides of the macadam sometimes become covered by an excessive coating of mud or dust which has been carried from the center either by traffic or heavy rains. This material holds the water on the road and prevents its reaching the ditches quickly and the excess should be removed.

59. The ditches and culverts should be kept free from obstructions at all times. All weeds and grass on the shoulders and ditches should be cut and removed from the road in the fall. Snow and ice should be removed from culverts before the spring thaw so that the water may flow away from the road quickly and without damage to it. On steep grades, during the spring thaw, the water has a tendency to follow down the wheel tracks made in the snow, and ice is apt to wash down to the stone and carry away the binding material. This water can easily be diverted to the side ditches.

60. A supply of broken stone and binding material, placed in piles about one-third of a mile apart, for repairs, should be kept along the road at all times. It is well to replenish these piles in the fall as it is often impossible to obtain the necessary material in the early spring when it is most needed.

61. The cost of maintenance of these roads need not be a hardship upon the taxpayers nor become burdensome, excepting in extreme cases of extraordinary damage caused by the elements. As heretofore stated, all slight defects should be discovered and remedied at once. A lack of attention on the part of highway commissioners or proper authorities can only result in extra expense and constantly increasing damage. If the directions for maintenance are carefully read and followed, these roads will be kept in good condition at a normal expense.

DOES THE MONEY SYSTEM APPLY TO HIGHWAYS IMPROVED UNDER CHAPTER 115 OF THE LAWS OF 1898 ?

62. The question having been frequently asked as to whether or not the money system of taxation applies to highways which have been improved under the Higbie-Armstrong Act, the Attorney General has been requested to render an opinion upon this subject, a copy of which is here inserted:

To the Honorable the State Engineer and Surveyor:

Dear Sir.—Replying to your inquiry: "Does the money system apply to highways improved under chapter 115, Laws of 1898," I have the honor to advise you that the so-called money system of taxation, as distinguished from the labor system of taxation, refers only to the system of taxation for working the highways in general in towns.

Section 12, of chapter 115, Laws of 1898, commonly known as the Good Roads Law, as amended by chapter 426, of the Laws of 1894, provides that, twenty days after service of a notice by the State Engineer and Surveyor upon the board of supervisors of a county to accept a highway which has been constructed under the provisions of such act, and the filing of said notice in the office of the clerk of said county, and thereafter they shall maintain the same as a county road, and may apportion the expense thereof upon the town or towns which said board deems benefited thereby; and the commissioner of highways of the towns respectively wherein such improved highways lie shall care for and keep the same in repair, under the direction and supervision of the State Engineer and Surveyor and such rules and regulations as he may prescribe.

Section 13 of said act reads as follows:

"All persons owning property abutting on such road, so improved, or residing thereon, shall thereafter pay all highway taxes assessed against them in money, and in the manner now provided by law."

If the town through which said improved highway runs has adopted the money system, section 13 above quoted adds nothing to the obligation resting upon owners of property abutting on such improved road to pay all highway taxes assessed against them in money, for the reason that in common with other property owners in the town, they became liable to the payment of all highway taxes in money upon the adoption by the town of the money system of taxation.

If the town in which said improved highways lies is still operating under the labor system, the effect of section 13 of the Good Roads Law is to withdraw from the owners of property abutting on such improved road the privilege of working out their assessments of highway labor and to compel them instead, to pay the highway taxes assessed against them in money.

Yours respectfully,

(Signed) JOHN CUNNEEN,
Attorney-General.

EXAMINATION OF TOWN BRIDGES UNDER SECTION 145 OF THE HIGHWAY LAW.

63. Whenever a town wishes to obtain the certification of the State Engineer to the proper completion of a bridge under section 145, the contract and specifications should be submitted for approval before the contract is signed.

64. When a bridge has been practically completed or is in course of construction at the time the matter is referred to the State Engineer, it is impossible to modify the contract and impracticable to ascertain the quality of the material used, or to certify that the quality is satisfactory. The State Engineer is therefore often unable to give his unqualified approval to the completed structure.

65. All strain sheets and shop drawings should be submitted for approval and provision should also be made for the inspection of materials, shop workmanship and erection by some competent firm of inspecting engineers approved by the State Engineer.

66. In view of the rapid improvement of public highways requiring the use of a steam roller, it is further advised that all bridges should be designed to conform closely to the best modern specifications and to carry in safety a steam road roller rated at ten tons, but actually weighing thirteen tons.

67. No appropriation has been made by the State Legislature for the payment of the expenses incident to the inspection of material, workmanship and erection, or the inspection of a completed bridge, and such expenses must of necessity be borne by the town requesting the inspection. The State Engineer will, however, carefully examine without charge therefor, any contracts, plans or specifications that may be submitted for his approval prior to the award of contracts.

68. Although bridges with a total length of 200 feet or less, having a span or spans of 100 feet or less, are not included in the law, nevertheless, it is important that such bridges be as carefully constructed as those which the law includes. The State Engineer will, therefore, when requested, examine contracts, plans and specifications without limitation as to length of span.

69. A copy of the specifications now used by the State Engineer's Department and recommended for the use of all towns in the state of New York, will be furnished without charge to town officers upon receipt of their request.

Note.—In any county of the State in which the supervisors have appointed a county engineer or a superintendent of highways, the work of repairing, improving or erecting bridges in any town in such county shall be done under the general supervision of the County Engineer or Superintendent of Highways pursuant to plans prepared or approved by him in accordance with section 55 of the Highway Law.

WIDE TIRES.

70. As to the desirability of the use of the wide tires there can be no question. The most casual observation will suffice to convince any one of the damage which a heavily laden wagon equipped with the ordinary sharp, rounded, narrow tires will produce on any road. There is also another and perhaps even greater advantage to be gained by the use of the wide tires, namely, the increased hauling capacity attained.

71. A very interesting bulletin (No. 12) has been issued by the United States Department of Agriculture giving a synopsis of the laws of various States in the Union and in foreign countries in relation to the use of wide tires, together with detailed descriptions of thorough tests which have been made and the results thereof. These tests proved conclusively the advantage

of wide tires to the general public as a road improver, and to the individual users as a money saver. It requires no complicated mathematics to figure out the benefits derived from the use of a vehicle capable of carrying on macadam roads 2,500 pounds as against 2,000 pounds, on gravel roads, 2,482 pounds as against 2,000 pounds, and on dry dirt roads 2,500 pounds as against 2,000 pounds; while on clay roads with deep mud slightly dry on top a large number of tests showed an average of 3,200 pounds for the wide-tired vehicles as against 2,000 pounds for the narrow-tired.

72. An instructive paper (Bulletin No. 39) issued by the Agricultural Experiment Station of the University of the State of Missouri, at Columbia, Mo., contains a very exhaustive discussion of the influence of the width of tires on draft of wagon, with details of tests in all descriptions of roads, on meadows, pastures, stubble and plowed lands, with cuts showing the roads as they appeared after the tests were made, and giving as a conclusion an advantage varying with different conditions of from 17 to 120 per cent, in favor of wide tires.

73. While the same local law may not be applicable to all parts of the state, the act which allows the Supervisors of each county to make their own law, thus enabling the varying conditions to be carefully studied and provided for, places it in the power of each county to take such action as may be deemed wise toward bringing into general use that which is universally conceded to be one of the most effectual aids to good roads and a saving of labor and expense.

74. Many tests have been made to establish the claims in favor of wide tires as against the narrow ones, and a few of the results are given as stated in Bulletin twelve of the United States Department of Agriculture, by General Roy Stone. In Utah, at the experiment station, it was shown that a given load on 1½-inch tire pulled 40 per cent. heavier than when on a 3-inch tire, the test being made on grass sod. On a moist, but hard road, the percentage was 12.7 in favor of the 3-inch tire. In Ohio a wide-tire test was made in the State University. An ordinary wagon with a new 3-inch tire was loaded with two long

tons of 4,480 pounds, and the draft measured by a dynamometer. On an ordinary earth road, in good condition and hard, the draft was 254 pounds. On a grass field it was 468 pounds. On a newly plowed field it was 771 pounds. As 150 pounds is the draft of an ordinary horse of 1,000 pounds, two horses could draw this load with ease on an ordinary road, and a ton and one-half on a grass sod; while with a narrow tire one-half as much, or a single ton, is a full load for a double team. Besides this the broad tires roll and level the road so that the more they are used the better the road becomes, while narrow tires cut it into ruts.

75. Professor Sanborn of the Missouri Agricultural College tried the same experiment with wagons having tires of different widths, using a Baldwin dynamometer. The weight of the load drawn was 3,665 pounds each. The tires were 1½-inch and 3 inches respectively. The tests were made on blue grass sod partially moist. The draft of the wide tires averaged for level ground 310 pounds. For the narrow tires the draft was 439 pounds or 41.06 per cent. more than the wide tire. Assuming the wagon to weigh 1,000 pounds, then on the broad tire 3,248 pounds would be drawn as easily as 2,000 pounds on the narrow tires. Again the broad wheels in the trial did not injure the turf, while the narrow wheels cut through it.

76. It will be seen, therefore, that the wide tires are not only lighter in their draft than narrow ones under nearly all conditions and that they cut up the road very little; in fact, when 4 inches wide they tend to make the road continually better.

78. That this subject has had the closest attention paid to it in Europe, is proven by the regulations adopted in the various countries as reported by the United States consuls.

79. In Austria all wagons built for a load of more than 2½ tons must have wheel with rims at least 4½ inches wide (Styria and Carinthia), and if built for more than 4½ tons (in Styria) or more than 3½ tons (in Carinthia) the rims must be at least 6¾ inches broad. In lower Austria a width of rim of 4½ inches is required for loaded wagons drawn by two or three horses. In Bohemia the same regulation applies.

80. In France every freight and market wagon is a road maker. The tires are from 3 to 10 inches in width, usually from 4 to 6. With a few four-wheeled vehicles used the tires are rarely less than 6 inches in width, and the rear axle is about 14 inches longer than the fore axle, so that the rear or hind wheels run about one inch outside of the level rolled by the front wheels.

81. In Germany the rule prescribes that all the wagons drawing heavy loads such as coal, brick, earth, stone, etc., must have tires at least four inches wide.

82. By carefully noting these regulations, one will see that in the European countries they have long ago discarded the narrow tires, much to the advantage of their roads and the saving of their horses and vehicles; and it is to be hoped that the American farmer after digesting these statements, will see the advantage of such a self-evident proposition and follow their example.

83. A narrow-tire wagon is a road destroyer; a wide-tire wagon is a road maker.

84. Several counties of New York state have taken advantage of the provisions of section 79 of the Highway Law conferring upon the Board of Supervisors the right to enact local and private laws regulating the width of tires used on vehicles built to carry a weight of 1,500 pounds and upwards. Supervisors who may desire copies of wide-tire laws adopted by various Boards of Supervisors may obtain the same by applying to this office.

COUNTY MEETINGS.

In several counties of the state either at a regular or a special meeting of the Board of Supervisors, a day has been set aside for the discussion of the questions appertaining to road laws and road improvements. The highway commissioners of the towns of the county have been invited to attend, and also the citizens in general who are interested in this question. These meetings have been productive of much good, and it is suggested that similar action be taken in all Counties of the State. Should meetings of this kind be called, it is the desire of this

Department to be of as much assistance as possible, and a representative will be detailed to attend such meetings if timely notice is given.

JOINT MEETING OF THE TOWN BOARD AND HIGHWAY COMMISSIONER.

In accordance with the opinion of the Attorney General of this State, a meeting of the Town Board and Highway Commissioner should be held for the purpose of determining and directing the manner of repair and improvement of highways under Section 53 of the Highway Law, at which time proper resolutions specifying the highway or highways, or particular portions thereof to be repaired or improved, the amount of improvements or extent of repairs, and the manner of causing the work to be done, whether by contract or otherwise, should be adopted.

The members of the Town Board should carefully read the directions contained in this bulletin; and their resolutions should be so framed as to carry the same into force and effect.

COUNTY ENGINEERS OR SUPERINTENDENTS OF HIGHWAYS.

The attention of the county engineers or superintendents of highways is called to Sections 55, 55-a, 55-b and 55-c of the Highway Law. They should without delay assume and perform the duties as therein prescribed and should be prepared to furnish this Department with semi-annual reports on the first day of April and the first day of October in each year. They will be supplied with copies of this Bulletin which contains directions of the State Engineer and Surveyor and such other rules and regulations or suggestions as may be required from time to time.

All correspondence general in character, and all rules and regulations which may be prescribed by the State Engineer and Surveyor for the guidance of town officials in the improvement, repair and maintenance of public highways, will be furnished to the county engineer or superintendent of highways in counties where the Board of Supervisors have made such appointment.

It is desirable that the closest relationship should be established between this Department and the county engineers or superintendents of highways.

POLL TAXES AND HOW COLLECTED.

The question having been frequently asked by various town officials as to how poll taxes are assessed, levied and collected, this Department has asked for an opinion from the Attorney General which is here printed in full.

Section 53 of the Highway Law provides that the poll taxes shall be assessed, levied and collected the same as any other town taxes, and section 65 of the Highway Law provides that in those towns in which the money system of taxation has been adopted, any person who is taxed a poll tax for highway purposes and who does not pay such tax in the manner and at the time prescribed by law, shall be liable to a fine of five dollars.

The opinion of the Attorney General is as follows:

To the Honorable the State Engineer and Surveyor:

Sir.—Replying to your request for a statement as to the manner of enforcing payment of poll taxes for highway purposes in towns, I have the honor to advise you that section 65 of the Highway Law imposes a penalty of \$5 upon every person who, in a town in which the money system of taxation has been adopted, is taxed a poll tax for highway purposes and does not pay such tax in the manner and at the time prescribed by law.

The same section imposes penalties in varying amounts for failure to appear and work when duly notified, for failure to comply with any requisition to furnish a team, cart, wagon, implements and man, and for remaining idle, not working faithfully or hindering others from working, in towns under the labor system.

The same section further provides that the said penalties may be recovered by action by the overseer of highways, as such, or by the highway commissioner in those towns having no such overseers. In towns that have adopted the money system such action would necessarily be brought by the highway commissioner.

Section 3026, of the Code of Civil Procedure, provides that an execution issued by a justice of the peace upon a judgment for a sum of money must require the constable to satisfy the judgment, together with his fees, out of the personal property of the judgment debtor within the county not exempt from levy and sale by virtue of an execution and further provides that if the judgment was recovered against a male person. In an action to recover a fine or penalty, the execution must

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o command the constable, if sufficient personal property cannot be
id to satisfy the judgment, to arrest the judgment debtor and to
vey him to the jail of the county, there to remain until he pays the
ment or is discharged according to law.

Yours very respectfully,

(Signed) JOHN CUNNEEN,
Attorney-General.

July 11, 1904.

STATEMENT AS TO PUBLIC HIGHWAYS AND AMOUNTS EXPENDED THEREON.

There are 74,097 miles of public highways in the state of New York.

There are 30,893 miles of highway in towns which have adopted the money system.

There are nearly 700 miles of roads constructed and under contract as provided for by section 115 of the Laws of 1898, known as the Hibbie-Armstrong Act.

The total mileage covered by first petitions under the Hibbie-Armstrong Act from the counties of the state is nearly 4,500 miles.

It is estimated that from 8,000 to 10,000 miles of public highways will ultimately be improved by state aid as provided for under chapter 115 of the Laws of 1898.

The money appropriated and used in the state as state aid is as follows, including 1899 to 1904:

Year.	Fuller- Plank Act.	Hibbie- Armstrong Act.	Total.
1899.	\$34,517 73	\$50,000 00	\$84,517 73
1900.	54,057 55	150,000 00	204,057 55
1901.	67,655 84	420,000 00	487,655 84
1902.	102,509 85	795,000 00	897,509 85
1903.	276,249 04	600,000 00	876,249 04
1904.	393,492 85	1,106,507 15	1,500,000 00
	\$928,482 86	\$3,121,507 15	\$3,049,990 01

The total cash amount of money expended under the money system in the improvement and repair of public highways for the year 1904 is \$1,311,365.89.

The total amount of money expended under the Hibbie-Armstrong Act for the year 1904, is \$2,213,014.30.

The total amount of cash expended for the improvement, repair and maintenance of public highways for the year 1904 is \$3,524,380.19.

The total amount of money appropriated by the state, counties and towns under these two laws for the years 1899 to 1904,

inclusive, is \$11,707,667.24 and the total amount of money being expended for the improvement, repair and maintenance of roads this year (1904) is \$3,524,480.19.

The appropriation of the State of Connecticut for the year 1904 is \$243,912.50; of Massachusetts \$450,000; of New Jersey \$400,000. The total appropriations of these three States amount to \$1,093,912.50.

The appropriation of New York State for good roads this year (1904) is \$1,500,000; or \$406,087.50 more than all of these good roads states. This certainly is encouraging to all citizens of the State who are interested in highway improvement.

TABLE SHOWING TOTAL MILES OF HIGHWAYS UNDER LABOR SYSTEM AND ALSO UNDER THE MONEY SYSTEM, OUTSIDE OF CORPORATE LIMITS, IN EACH TOWN OF EACH COUNTY IN NEW YORK STATE, EXCLUSIVE OF THE COUNTIES OF KING, QUEENS, RICHMOND AND NEW YORK, WHICH COMprise THE CITY OF GREATER NEW YORK. (*Measured on the maps of the 1895 edition of Bien's Atlas of New York State, scale 1 inch to 2 1-2 miles. Fractional parts of miles not included.*)

County.	Labor System. Miles.	Money System. Miles.	County.	Labor System. Miles.	Money System. Miles.
Albany	364	713	Oneida	1,376	987
Allegany	1,497	292	Onondaga	720	735
Broome	217	1,120	Ontario	803	485
Cattaraugus	1,693	147	Orange	262	1,315
Cayuga	906	530	Orleans	416	281
Chautauqua	389	1,438	Oswego	1,624	110
Chemung	652	88	Otsego	717	1,342
Chenango	468	1,191	Putnam	242	215
Clinton	1,144	157	Rensselaer	470	786
Columbia	488	785	Rockland .....	.....	348
Cortland	416	573	St. Lawrence	1,211	1,667
Delaware	2,091	.....	Saratoga	376	599
Dutchess	204	1,281	Schenectady	390	.....
Erle	1,648	243	Schoharie	603	604
Esex	692	551	Schuyler	503	228
Franklin	1,066	146	Seneca	675	.....
Fulton	657	72	Steuben	2,093	.....
Greene	154	873	Suffolk .....	.....	1,805
Genesee	839	67	Sullivan	1,192	399
Hamilton	870	.....	Tioga	188	823
Herkimer	661	719	Tompkins	82	983
Jefferson	1,470	646	Ulster	1,279	380
Lewis	1,287	67	Warren	774	119
Livingston	756	470	Washington	555	846
Madison	252	1,156	Wayne	1,045	219
Monroe	754	563	Westchester	80	853
Montgomery	518	269	Wyoming	1,016	87
Nassau .....	.....	512	Yates	727	.....
Niagara	945	.....		42,517	30,893

TABLE SHOWING THE TOTAL AMOUNT OF MONEY RAISED FOR HIGHWAY PURPOSES BY THE TOWNS IN EACH COUNTY, AND THE TOTAL AMOUNT PAID TO EACH COUNTY TREASURER BY THE STATE, MAKING A TOTAL CASH EXPENDITURE IN 1904 IN THE MONEY SYSTEM TOWNS OF THE STATE, UNDER THE FULLER-PLANK LAW, OF \$1,311,365.89.

County.	Amount raised by towns in county.	Amount paid by State.	County.	Amount raised by towns in county.	Amount paid by State.
Albany	\$16,804 25	\$7,108 08	Onondaga	*	\$10,836 22
Allegany	5,672 18	2,346 56	Ontario	12,534 22	6,013 45
Broome	23,192 41	10,212 89	Orange	46,558 76	16,300 35
Cattaraugus ..	3,900 00	1,645 37	Orleans	13,951 58	4,699 42
Cayuga	10,930 82	5,265 06	Oswego	2,251 57	750 52
Chautauqua ..	30,172 78	13,328 86	Otsego	18,661 01	8,829 30
Chemung	2,350 00	1,167 39	Putnam	12,000 00	5,345 11
Chenango	21,780 91	8,757 12	Rensselaer	22,710 61	10,568 52
Clinton	2,277 52	796 60	Rockland	20,680 00	6,290 29
Columbia	21,521 00	8,897 86	Saratoga	11,320 96	5,626 91
Cortland	8,709 72	3,795 53	Schoharie	9,628 95	4,758 50
Dutchess	43,625 00	18,606 12	Schuylerville	2,390 24	1,432 41
Erie	18,932 23	6,895 08	St. Lawrence	42,369 62	16,215 19
Essex	15,249 56	4,858 91	Suffolk	106,158 00	40,961 87
Franklin	8,634 60	1,638 08	Sullivan	8,200 00	1,583 25
Fulton	1,475 00	498 80	Tioga	12,025 59	6,012 79
Genesee	2,000 00	1,000 00	Tompkins	20,389 82	8,305 67
Greene	18,940 00	7,004 75	Ulster	12,300 00	3,832 43
Hamilton	1,293 24	253 05	Warren	2,556 88	768 84
Herkimer	18,295 96	6,690 28	Washington	19,730 06	7,996 01
Jefferson	13,936 93	6,968 46	Wayne	7,785 00	3,892 50
Lewis	1,200 00	544 40	Westchester	78,297 72	33,744 75
Livingston ...	12,786 66	6,356 60	Wyoming	1,000 00	500 00
Madison	20,581 53	10,290 76			
Monroe	22,182 03	10,369 86	Total	\$917,873 04	\$393,492 85
Montgomery ..	5,614 00	2,625 23			
Nassau	33,500 00	16,750 00			
Oneida	20,704 99	10,287 82			
Onondaga	27,569 08	13,281 09			

*1903 State aid.

EXTRACT FROM THE ADDRESS DELIVERED BY
ASSEMBLYMAN JEAN L. BURNETT,
OF ONTARIO COUNTY,

AS PERMANENT CHAIRMAN OF THE FIFTH ANNUAL SUPERVISORS' HIGHWAY CONVENTION OF THE STATE OF NEW YORK, HELD AT ALBANY, NEW YORK, JANUARY, 26 AND 27, 1904.

The movement for the practical and permanent improvement of the public highways of New York has become a concrete, militant factor in the political and civic affairs of our commonwealth. The necessity for the physical betterment of the road system of the state and the commercial advantages that will undeniably accrue from the same, are recognized to a greater or less degree by all classes of our citizens. He who has accorded the subject the study that its importance justifies realizes that this necessity and these advantages can scarcely be overestimated, while even the casual thinker disputes neither the theory nor the practicability of the idea. The effort for good roads, then, is one which, in the abstract, at least, happily elicits the approval of our people generally, regardless of occupation, partisanship or residence, and the approbation of all communities, municipal and rural.

The cause for which you labor, and in whose interest you have assembled, is therefore indeed a virtuous one. Its popularity and progress have been definitely apparent as the agitation has continued with so much zeal, and, I may say, patience; until to-day you may well felicitate yourselves upon the fact that your endeavors, and those of others equally interested in the work, have been so effective that at this time you gather in convention under conditions more significant and auspicious than you have heretofore experienced.

The movement for highway reformation is one of the most interesting chapters in the annals of our State. That it is comparatively a recent development of our economic life is remarkable, for in all stages of the world's history the consequence of rapidity and safety of transit has been appreciated by enlight-

ened peoples to the extent that the saying "The character of a nation's roads is a test of its civilization," has become trite. It is nevertheless true that in many of the most cultured countries the rural thoroughfares are primitive and grossly neglected. America is no exception. But the magnificent roadways of England, Germany and France, which are the admiration of the American traveler, have proved an inspiration and a lesson which stimulate interest in such enterprises in our own country. The erection of railroads in the United States was practically contemporaneous with the birth of the government. And it was natural that the extension and promotion of the railroad system should have occupied the attention of our people to the exclusion of that no less vital element of our national development, the country highways. The astonishing growth of transportation facilities both by rail and water presents the principal reason for the comparative neglect of the common road. Lengthy highways such as the Romans and the ancient Aztecs required for military and commercial purposes are now neither desirable nor useful. But the economist, while he welcomes with enthusiasm the expansion of our modern instrumentalities of commerce, deprecates no less earnestly the abandonment or retrogression of the original, and what may be termed the natural agencies of transportation. Realizing this Governor Ames of Massachusetts, in 1889, addressing the Legislature, remarked that while we are "dependent upon steam railroads for the carrying of passengers and freight, yet all such passengers and freight have to pass over the roads leading to and from the steam roads." In this truth rests the very genius of the movement for highway adequacy and proficiency. The expense of the transportation of products and commodities by horses and wagons is a matter of great importance of which few people have a clear knowledge. The Bureau of Statistics at Washington is responsible for the information that the average cost per ton mile of "haul" in this State is approximately twenty-six cents; that the average "haul" is six miles, and the average cost per ton of the average "haul" is one dollar and fifty-six cents. The value of farm products of New York for the latest year

for which statistics are available was \$245,270,600. These products of our State are considerably in excess of 12,000,000 tons annually, which for the most part pass over the country roads to the markets or railroad stations. The total cost of hauling them is only a matter of mathematical calculation and it is no inconsequential item. It is stated by competent authorities that in most of the western wheat regions, if wheat has to be transported more than eighteen or twenty miles to reach water or railroad, this land-carriage in ordinary years annihilates the profits of culture. It costs most farmers more to carry a bushel of grain one mile than it does the ordinary railroad to carry a ton an equal distance. There are over 650,000,000 bushels of wheat raised yearly in this country, practically all of which, except that reserved for seed, are carried over our roadways a distance of several miles on the average. The per annum production of other grains is more than 3,760,000,000 bushels, a large proportion of which is also so carried. One cannot escape the conclusion that the importance of good roads from a standpoint of saving and profit to the producer alone is tremendous. A well-known expert, the author of a "Practical Treatise on Roads, Streets and Pavements," presents a table compiled after careful trial with a dynamometer attached to a wagon moving at a slow pace, which gives the force of traction in pounds upon several different kinds of road surface in fair condition, the weight of wagon and load being one ton of 2,240 pounds:

	Pounds.
1. On best stone trackways.....	$12\frac{1}{2}$
2. On a good plank road.....	32 to 50
3. On a cubical block pavement.....	32 to 33
4. On macadamized road of broken stone....	65
5. On a Telford road, made with six inches of broken stone of great hardness, laid on a foundation of large stones set as a pave- ment	46
6. On a road covered with 6 inches of broken stone laid on concrete foundation.....	46
7. On a road made with a thick coating of gravel laid on earth.....	140 to 147
8. On a common earth road.....	200

These figures demonstrate that any one of the better class of permanent roadbeds would enable a team to draw on a level, nearly four times the amount drawn on a common dirt road in good condition. The author of the work to which I have referred, however, adds that we should consider that undoubtedly for more than half the year our roads are not "in good condition."

It costs, as has been said, \$1.56 to carry a ton of produce six miles, the average "haul," on a farm wagon in the ordinary condition of the highway. The same ton can be taken thirty miles for \$1.56 upon a trolley car. It can be carried three hundred miles for \$1.56 upon a steam road, and it can be transported one thousand miles for \$1.56 upon a lake vessel. In this connection it is interesting to know that the average cost of drawing farm products in England and France is about ten cents per ton per mile; in Germany, six and one-half cents; in Belgium, nine and one-half cents; in Italy, seven and one-half cents, and in Switzerland, with her mountains, eight cents. A conservative estimate of cost per ton mile upon a good macadam surface is seven to nine cents. With uniformly good roads the cost of "haul" in this State could be reduced very nearly to one-quarter and represent therefore a saving in preliminary transportation alone, without other conditions of wear and tear, of practically \$16,000,000 a year.

* * * * *

Aside from the elements of convenience, sanitation, comfort, picturesqueness and durability which are patent attributes of proper road construction, the practical factor is the economic one—the one which appreciates land values and property. A well-known civil engineer, Professor Thomas McClanahan, of Illinois, an expert road maker and economist, estimates that thorough drainage alone of the prairie roads would make enough difference in them to add \$15 per acre to the value of the best farm in central Illinois. And Professor Jeremiah W. Jenks, Ph. D., in "Road Legislation for the American State," observes:

"Judging from the increased value of all farming lands situated near cities or large towns, if the road to the town is a good one, it is hardly extravagant to say that two-thirds of the farms in the Mississippi valley, of which the present value is from \$40 to \$50 an acre, would be increased in value to the extent of \$10 an acre if good roads were made by them. * * * Similar figures could, of course, be applied to all grain-producing states with a similar showing."

The same author, dwelling upon the economic extravagance that accompanies negligence and neglect in road making, remarks:

"Even at the risk of what may seem tiresome iteration, it seems best to attempt fully to realize for ourselves what our poor roads are costing us yearly. To approach the subject from another direction: If the estimate as to the amount that can be hauled at various seasons of the year in Illinois be correct, we find that an ordinary draft horse whose earnings may safely be estimated at fifty cents per day, or for three hundred days one hundred and fifty dollars per year on good roads, would on those poor roads earn but two-thirds as much, say \$100. If the roads now were to be improved so that for one-half the year good loads could be hauled, and for the other half two-thirds as much on the average, no unreasonable supposition, instead of \$100 in 300 days the horse would be able to earn at the same rates \$125. Though under such circumstances the rates of hauling would, of course, vary, so that the horse might not earn so much more money, nevertheless the ratio of \$100 to \$125 fairly represents the increase in productive capacity. The estimate made by Professor Ely, that our poor roads cost the farmer on the average at least \$15 per horse, seems from the above consideration a low estimate. At that rate the cost to such a state as Illinois is more than \$15,000,000 per year (\$15,346,230), if we were to consider the horses enumerated as on farms as representative of those used in the state. Of course, the number is more than that. In the Engineering News, Clemens Herschel, a civil engineer of Boston, in comparing our roads with those of England, after a careful statistical study of the different kinds of roads and pavements, says:

"The English horse employed in the streets of a city or on the roads of the country does twice as much work as the American horse similarly employed in America. This is the patent undeniable fact. The simple explanation is that the Englishman has invested in perfect and permanent roads what the American expends in perishable horses that require to be fed.' He expressly denies that the explanation can be found in better horses, or in better treatment of them, or in harder work for them. The only explanation is found in the better roads of England."

But we need not go far from home for figures and facts that afford sufficient food for serious reflection. In 1900 the total number of farms in New York was 226,720. Their acreage was 22,648,109, which is 74.3 per cent. of the entire land area of the state, 9,351,891 acres being forestry. The valuation of these farms was placed at \$888,134,190, of which amount \$336,959,960, or 37.9 per cent., represents the value of buildings and \$551,174,220, or 62.1 per cent., the value of land and improvements other than buildings. The value of farm machinery and implements on the same statistical date was \$56,006,000 and that of live stock \$125,583,715. These values added to that of the farms themselves give the total valuation of farm property in this state at no less than \$1,069,723,895. However, in 1890 the number of farms was 226,223, so that the increase in a decade was only 497. In 1890 the acres of improved farm land were 16,389,380, and ten years afterwards there were only 15,599,986, a decrease of 789,394. The unimproved land in 1890 was 5,571,182, and in 1900 7,048,123, an increase in unimproved acreage of 1,475,941. During ten years the farm lands, both improved and unimproved, increased 686,547 acres. But in 1900 the value of land, buildings and improvements amounted to \$888,134,190 as against \$968,127,286 in 1890, a decline of no less than \$79,993,096. The same period witnessed an increase of \$9,346,535 in implements and machinery, and of \$1,059,850 in the value of cattle and live stock, a total gain of \$10,406,385. So that the statistician points out that the net depreciation in farm values in New York during the census period of ten years amounts to \$69,586,385. To

this may be added the statement that New York has fallen from her position as the third state in the Union in farming in 1890, to the fourth place which she now occupies in the ranks of the agricultural states.

* * * * *

Whatever may be our individual opinions as to the immediate or remote economic and financial effects to be derived from the process of intelligent highway construction and advanced methods of maintenance, and whatever views we may entertain respecting the most approved mode for the accomplishment of these objects by local authorities and through legislative action, we will not differ upon the general proposition that "There is no more common interest than the common road." That this conviction is becoming widespread is evidenced by the fact that there were introduced in the Legislatures of thirty States during 1903 no less than seventy bills, general in character, providing for better rural thoroughfares, besides a considerable number of measures enabling individual counties to undertake road work by issuing bonds or levying special taxes. Since the establishment of the Federal Office of Road Inquiries in 1893 remarkable advancement has been made in this direction. Previous to that time only one State, New Jersey, was aiding the counties in the care of public highways, but since then Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Pennsylvania, Delaware, California and our own commonwealth have established precedents and are assisting the communities by money donations from their treasuries. In New Jersey the State contributes one-third of the cost, in Connecticut two-thirds and in some instances three-quarters of the expense, while the counties, towns, townships and property owners subscribe the balance. Maryland, North Carolina, Michigan and Illinois have highway commissions for the purpose of collecting and disseminating information, but as yet they make no appropriations for actual construction."

ROADS IN EUROPE AND AMERICA COMPARED.

THE SUBJECT OF GOOD ROADS DISCUSSED FROM AN ECONOMIC STANDPOINT. THE STATE AID LAW EXPLAINED AND ITS BENEFITS POINTED OUT.

(BY SENATOR WILLIAM W. ARMSTRONG, OF ROCHESTER, AUTHOR OF THE STATE AID LAW.)

Of all the civilized countries of the earth, ours is the youngest. We are proud to believe it one of the greatest, but we have only recently celebrated the 400th anniversary of the discovery of this continent and only just completed the 127th year of our existence as a republic. Now, there are some disadvantages in growing too fast for countries as well as individuals, and one of the disadvantages of our rapid growth has been that we have not had time in a regular and orderly way to provide highways for the transportation of our products.

To the older nations of the earth the development of the highways of transportation came naturally and gradually. First, the common roads, then the canals, and lastly the railroads. For us, however, the development of our country proceeded so rapidly that it disturbed this natural and orderly course, the skillful building of common roads was not attempted at all, but canals came first, closely followed by railroads, and only recently has the proper development of our common roads claimed our attention.

We would have builded surer and better had we pursued the natural course of things, and now that we have discovered our mistake we should address ourselves to correcting it with customary American promptness and energy.

It requires no argument to convince most men that good roads are necessary and that our local roads ought to be much better than they are, but comparatively few comprehend the real economic value of improved highways.

There are but two primary sources of wealth from which come all the other values and they are what is grown upon land

and what is taken out of it. The wealth of our cities, the value of the stocks and bonds of our railroads, the output of our factories and the possessions of every individual and corporation, depend alike upon these two sources; but before a pound of what is grown upon the land or gotten out of it may be marketed or mingled with the assets of the world, it must be first transported for a longer or shorter distance over some kind of a highway and usually over the better or worse unimproved roads with which we have so long been familiar. Have you ever considered the enormous waste of energy on a poor road?

The last available figures were published recently by General Stone, chairman of the office of road inquiry, of the Department of Agriculture of the United States. His department issued 10,000 inquiries to all parts of the United States asking for information regarding the average length of haul and cost of hauling loads to market and received replies from over 1200 counties. From a compilation of these he arrived at the conclusion that the average length of haul in the United States was 12.1 miles and the average cost of hauling a ton per mile in the United States was about 25c. From the latest available census reports he estimated that the total weight of farm produce in this country exclusive of building, fencing and road materials, fertilizers, coal, ore, metals, meats, eggs, poultry, straw, fodder, garden produce and manufactured merchandise, and exclusive of the hay and grain consumed on the farms where raised, was 219,824,247 tons, and that the annual output of lumber and lumber mill products was 93,525,000 tons, making an aggregate tonnage of farm produce and lumber of 313,347,227 tons. The annual cost of marketing this enormous tonnage at an average haul of 12.1 miles and an average cost per mile per ton of 25c was \$946,414,665. If to this be added the tonnage of the excluded articles just enumerated it would undoubtedly bring the gross figure up to a round \$1,500,000,000.

But he did not stop there. He ascertained by similar inquiries that the average cost of hauling farm products in England and France was about 10c per ton per mile. In Germany 6½c; in Belgium 9½c; in Italy 7½c; and in mountainous

Switzerland 8e. From this information his conclusion was that nearly two-thirds of the vast expenditure of \$946,414,665 for hauling farm products and lumber to market in the United States was directly chargeable to the uniformly bad condition of our roads as compared with the uniformly good condition of the roads in European countries. This makes the economic value of the problem in this country annually amount in round figures to \$630,000,000 and the subject is one, therefore, well worth the consideration of any man and the saving of such an enormous sum of annually wasted energy, a subject economically of the highest importance.

His inquiries in detail as applied to our own state showed that the average length of haul in the eastern states was 5.9 miles and the average cost of marketing a ton was \$1.87. Now if the annual tonnage of farm products in this state be estimated as near as may be from the census reports at 12,000,000 tons, the annual expense of marketing the farm products of this state reaches the large figure of \$22,440,000 annually and if only one-half instead of two-thirds of that be charged to wasted energy upon unimproved roads the economical question in this state amounts to over \$11,000,000 annually.

For many years in this state, prior to March 24, 1898, the topic of good roads had attracted the attention of a large number of earnest people, and in the adjoining states of New Jersey, Connecticut and Massachusetts the legislatures had already undertaken by one plan or another the solution of the question.

Early in the movement which preceded the enactment of this law there were many plans put forward, and there was much lack of harmony among good roads advocates themselves amounting at times to positive disagreement; but as the agitation and the argument proceeded, opinion began in a general way to coincide along certain lines, and these finally came to be so well regarded that they were deemed controlling, and in constructing the New York law they were carefully observed. Briefly stated, they were these:

First. The law should not be compulsory, and no locality should be compelled to build good roads until the sentiment of the locality itself inaugurated the movement.

Second. The law should provide for the improvement of rural highways as distinguished from the highways in cities and villages, because it was assumed that cities and villages were capable of solving their own highway problems, without aid from the state. Nor was this thought to be any injustice, for no one who comprehends the extent to which the prosperity and progress of the state depends upon the condition of its farms and its farmers will criticise the excluding of cities and villages from the benefits of the law. Cities and villages exist by virtue of the sustaining power of the country about them, and the products of the farm either find a market in these cities and villages or pass through them to the markets of the world, and this largely contributes to the prosperity of such cities and villages. Indeed, as we have already suggested, since the primary sources of value are what is grown upon the land and gotten out of it, it is axiomatic that cities and villages exist by and are supported from the country contiguous to them.

Third. The law should provide substantial assistance to those localities which might be willing to take the steps to construct good roads, because good roads cost good money, and farmers could not afford them unless they received substantial assistance. The poorest roads are generally found in the localities where the farms are poorest and the need of good roads is the greatest, and farmers in such localities have hard work to get crops out of their farms and little time left for the improvement of their roads. At the same time and for the same reasons the cost of good roads must not be burdensome upon the localities which construct them.

Fourth. The law should provide the state aid in such a way that those localities desiring good roads most, can get them first, so that their zeal for local improvement may be promptly rewarded and other localities encouraged; and yet this state aid must be so provided that the assistance should be impartially distributed without being influenced by political pulls or other similar influences, and this distribution must be made not only impartially but in such a way that the money of the state expended for good roads should awaken interest in them and encourage the growth of a desire for improved highways in lo-

calities where the sentiment might be sluggish and in need of stimulation.

Fifth. Last and by no means least, the law must so provide for state aid that the state can itself each year adjust its contribution to good roads as well to the condition of its own pocketbook as the needs of its people, and must hold in check the amount of annual road building so that it may proceed steadily and economically and not by "fits and starts."

By this means the state has provided the legal machinery for the building of good roads but has not made it compulsory to build them and has left it entirely to the localities as to where and when they will cause the improvement thereof. It has divided the burden of cost so equitably that it does not rest heavily upon any of the parties interested, the state, the county or the town. It has limited the application of the law exclusively to highways outside of cities and villages and it has provided substantial assistance to those localities which are willing to take the steps to cause the improvement of their highways, while minimizing the contribution of other localities for the necessary assistance.

It has provided a plan whereby those desiring good roads most can get them first, and it has provided for the impartial distribution of the moneys provided by the state without influence by political pulls or otherwise and yet for its distribution in such a way as to stimulate the desire for improved highways in the localities where the sentiment is sluggish; and, lastly, kept to itself the power of its annual appropriation to limit the amount of road improvement and adjust its contribution of good roads as well to the condition of its own pocketbook as to the needs of its people, while at the same time providing a plan which will cause a sufficient number of counties to ask for appropriations to insure economic progress in road building, whatever party is in power.

We have now in this state practically adopted a policy whereby no direct state tax is levied for general purposes, including of course the building of good roads, so that we may eliminate any state tax from consideration.

Let us see whether or not this plan is of interest to the county of Wayne. The assessed value of the real and personal property in your county is \$24,411,044.

To make the matter entirely plain, I have prepared a table which shows the cost per \$1,000 of assessed valuation of a mile of road costing \$8,000 per mile in each town of your county.

Cost per \$1,000 of assessed valuation of a mile of road costing \$8,000 in each town of Wayne county:

Towns.	County Tax.	Town Tax.	Total
Arcadia	\$.11½	\$.39½	\$.50½
Butler .....	.11½	1.64	1.75½
Galen .....	.11½	.40½	.51½
Huron .....	.11½	1.74	1.85½
Lyons .....	.11½	.40½	.52½
Macedon .....	.11½	.69½	.81
Marion .....	.11½	1.03	1.14½
Ontario .....	.11½	1.50	1.61½
Palmyra .....	.11½	.41½	.52½
Rose .....	.11½	1.27½	1.39½
Savannah .....	.11½	1.14½	1.26½
Sodus .....	.11½	.50	.61½
Walworth .....	.11½	1.26½	1.38
Williamson .....	.11½	1.09½	1.20½
Wolcott .....	.11½	1.19	1.30½

The entire average cost of building good roads in Wayne county would, therefore, be \$1.09½ per mile and the taxpayers of your county would be obliged to contribute only 11½ cents per mile to assist the building of a mile of improved road in each town where it was undertaken.

But you are not obliged to have an \$8,000 a mile road, for the law provides you may have gravel, macadam, or whatever kind of a road you choose to specify, and if you choose to build gravel roads at \$1,000 a mile you can obtain them with proportionately cheaper results.

The railroads are laying heavier rails and building stouter bridges and ordering bigger engines, some of the canal people are for a ship canal and some for a barge canal, but all of them

for a bigger canal, and you are buying more land and better machinery, and John is going to college and Mary is taking music and painting lessons, but the poor old dirt road with its ruts and its mud, the common reliance of you all and us all, over which every pound you raise to sell must go to market, cries out year after year for improvements long past due, and the barrier between you and good roads in Wayne county is an average expense of \$1.01½ per mile for each \$1,000 you are assessed!—From Senator Armstrong's Speech Delivered at Sodus Point, August, 1903.

SPECIAL ECONOMY IN ROAD CONSTRUCTION.

(ADDRESS BY FRANK D. LYON, SPECIAL EXAMINER OF HIGHWAYS, STATE OF NEW YORK, AT GOOD ROADS CONVENTION, HELD IN ALBANY, JANUARY 26 AND 27, 1904.)

Mr. Chairman and Gentlemen of the Convention.—I desire to call your attention to the fact that in the minds of many the real meaning and intention of the Higbie-Armstrong law is misunderstood. A Higbie-Armstrong road may be constructed at a cost of possibly as low as \$1,800 per mile and the cost varying in accordance with the value of the material and the cost of labor. It has been the rule that those petitions which have been filed in the State Engineer's office are presented by the various supervisors for those roads which the town authorities have been unable to keep in a passable condition; roads that have been carrying extraordinarily heavy traffic and which have been impassable, particularly in the spring and fall.

It has always been the practice of the department in locating an improved road and in formulating the plans as to material to be used to carry out the wishes of the authorities so far as possible and practicable in the towns or counties in which the road is to be constructed. Dirt roads, gravel roads and shale roads have been built, and while they have been satisfactory in the main, yet after practical experience and a test the tendency is to change and adopt materials for construction which are more expensive and which seem to give better satisfaction on account of durability.

I therefore desire to call your attention to State Engineer Bond's report to the Legislature for the years 1899 and 1900, as follows:

"AIM IN ROAD BUILDING."

"In road building the main object is to get the greatest length of the best road for the least money.

"The best road will have the location which will give the best drainage and the easiest grade and will serve the most traffic. The best road will have the design and construction which will

give a perfectly drained bed of dry earth supporting a smooth and water-tight surface.

" This will enable it to shed water with least delay; to endure frost with least change; to carry traffic with least wear; to carry heaviest loads with least effort; to carry light loads speedily with least jolt.

" The best construction of a road can only be obtained under skillful supervision, by correct formation of the drains and of the roadbed, and by the careful selection of proper materials and close and constant attention to the manner in which these materials are prepared, placed and consolidated.

County authorities can have stone and materials for road building tested by the State Engineer's Department free of expense instead of building roads and finding too late that the material was unfit.

* * * PRISON LABOR.

" The principal formation of trap-rock exists in Rockland county, just across the Hudson river from Sing Sing prison, where a large number of convicts are confined in idleness, which is injurious to them and expensive to the State. It would seem practicable that the State should open a quarry in the trap-rock formation near Sing Sing at a point back from the river where the picturesque features of the Palisades should in no wise be affected by it, and should equip this quarry with stone-crushing machinery.

" The convicts could here be confined as securely as in Sing Sing and the crushed rock delivered at the wharf on the Hudson river at about one-third the price now charged by private quarries along the Hudson river in New Jersey. * * *

" For such localities as could only be reached by railroad transportation, special freight rates could doubtless be arranged with railroad companies, since railroads profit directly by the improvement in highways, all of which are direct tributaries to the railroads and bring to them business which is created by the existence of good highways. * * *

" The counties wishing to reduce the cost of improving their highways can employ upon the work of drainage and of grad-

ing, the prisoners confined in idleness in the county jails, which are now sought by the criminal classes as a welcome retreat where they can be cared for at the cost of the taxpayers; 1,500 men are thus confined, many of whom can be usefully employed in improving the highways. * * *

IMPROVED ROADS WHICH ARE NOT MACADAM ROADS

"Some counties can afford to pay one-half of the cost of the first-class crushed rock roads which are built by state aid at \$7,000 to \$9,000 per mile, but many other counties want improved roads which are neither so good nor so costly as the macadam roads.

"The provisions of the Higbie-Armstrong law are such that the State Engineer is enabled to select for the improvement of any highway a Telford, macadam or gravel roadway, or other suitable construction, taking into consideration the climate, soil and materials to be had in that vicinity and the extent and nature of the traffic likely to be upon the highway, specifying in his judgment the kind of road which a wise economy demands. * * *

"The existing roadway will be properly cleared of sod and stones, and properly graded with ditches and culverts necessary for perfect drainage and the natural material forming the present road will be properly formed and crowned and rolled, as is now done to form a subgrade for a macadam road. * * *

"In any such case an improved road will thus be made which will be vastly better than any former condition of such highway, and which will drain itself much quicker and be in every way much better than the existing roadway. It will not be a macadam road, but it will be an improved road, and its cost will be less than one-third of the cost of a macadam road; or, say, \$2,000 to \$3,000 per mile. If the local authorities should later desire to make a macadam road on such an improved highway, the grading and ditching and forming which have been described will be so much work already done toward forming such a high grade macadam road."

These quotations from the former reports of the State Engineer are as true to-day as when they were first published.

Much has been said and written relative to the use of the steel track, stone track and particularly that which is known as Long's brick track. The press has contained articles which have been written by purported experts commending the stone track road between the cities of Albany and Schenectady, and you might be interested in knowing that the authorities living in the immediate neighborhood and using this road have petitioned the State Engineer's Department to remove the same and to construct an up-to-date macadam highway.

Many misleading statements have been made publicly and otherwise, and circulars, pictures and newspaper clippings have been sent broadcast over the state in advocacy of the use of that which is known as Long's brick track, and right here allow me to state most positively that Long's brick track is absolutely impracticable and worthless, and that it is impossible to construct a road of this character on practical lines so that it will give satisfaction in any particular. The facts in regard to the cost and durability of this brick track road have been grossly misrepresented. The only road of any length which it has been attempted to construct in this manner is at Blaisdell in Erie county. I have been informed that an unwily contractor was induced to attempt this work at a cost of \$4,000 per mile and he was obliged to abandon his contract. A new contract was then made at something over \$7,000 per mile and this contractor also abandoned the work. Erie county took up the work then under the direction of the county engineer and completed the same at a total cost of something over \$11,000 per mile. The road was then opened up to heavy traffic, and after a short period of use, owing to its deplorable condition, it became necessary that the county engineer should direct that the whole road be covered with slag, which was done.

As to the question as to what means should be employed so that the greatest number of miles of Higbie-Armstrong road can be constructed at the least possible cost it would seem that the problem is easy of solution by the cheapening of the cost of delivery of broken stone or other product, which, of course, involves the cost free on board ears or boat and the cost of transportation. There are about 7,000 miles of road to be

constructed under the Higbie-Armstrong act in the State of New York, which will connect all of the principal marketing points and furnish a system of roads complete leading east and west, north and south throughout the entire state. Approximately it takes about 1,000 tons of broken-stone product to complete the top course or wearing surface of one mile of highway 16 feet wide. Therefore a demand is made for over 7,000,000 tons of broken-stone product for this purpose provided these roads should be so constructed that they would be termed a macadam highway. The average cost of this material at the quarry free on board cars or boats varies from 60 to 75 cents per net ton, and it strikes me that the solution of the problem as to the cost of production is an easy one providing that the Legislature should see fit to carry out the recommendations which I have already quoted to you of State Engineer Bond relative to the question of employment of the State's prisoners in quarrying the stone product, crushing the stone by machinery and delivering it free on board cars or boats, thus creating a net saving of over \$3,000,000 in the cost of the construction of the entire system of the State or a saving of over \$500 in the cost of each mile of highway, and that for surface dressing alone.

Measures should be taken immediately to interest the railways of the state in this great question and to show them that the construction of prominent highways leading to and connecting the principal marketing points will increase the volume of product delivered from the agricultural districts to their stations at from 25 to 30 per cent., that being the amount of farm products which from the best estimates goes annually to waste owing to the inability of the farmers to deliver the same in the spring or fall and when the products bring the highest market price. Their attention should be called to the fact that the railways are in a position to deliver during the next few years over 7,000,000 tons of freight and in addition thereto thousands of tons of broken stone and other products which will be used from year to year in the maintenance of completed roads. Freight rates are a serious problem, and it is undoubtedly a fact that were these questions properly submitted for the considera-

tion of the various general freight agents of the railways of the state of New York they would readily grant a concession of at least an average of 50 cents per ton, thus saving over \$3,000,000 more in the cost of construction of the entire system of the state, or a saving of over \$500 for each mile of highway, making a net reduction in the cost of construction of macadam highways of over \$1,000 per mile.

I believe that public interest demands the construction of first-class highways, permanent in character; that we should not put forth our energies in an effort to produce a road carelessly and cheaply built, but that we should see to it that the greatest care and attention is given to the question of construction, recognizing the fact that a good road may be expensive; that a poor road is a bad road and that a middling good road is like a middling good egg.

GOOD ROADS.

By JOSEPH W. HUNTER, STATE HIGHWAY COMMISSIONER OF PENNSYLVANIA.

"There is one road to Peace, and that is truth, which follow ye."—Shelly.

"It is not my desire nor do I intend to write any essay on Good Roads but to state in a brief way some of the essential and important points that are necessary to be observed in the construction of Good Roads, and which have been stated in various forms by others.

"Sir Henry Parnell says: 'The art of road-making must essentially depend for its success on its being exercised in conformity with certain general principles; and their justness should be rendered so clear as to be evident as not to admit of any controversy.'

Rapidity, safety and economy of carriage are the objects of roads. They should therefore be so located and constructed as to enable burdens of goods and passengers to be transported from one place to another in the least possible time with the least possible labor, and with the least possible expense.

To attain these important ends, a road should fulfill certain conditions which the nature of the country over which it passes, and other circumstances, may render impossible to unite or reconcile in one combination; but to the union of which we should endeavor to approximate as nearly as possible in forming an actual road upon the models of this ideally perfect one.

Every road, other things being equal, should be perfectly straight, so that its length, and therefore the time and labor expended in traveling upon it should be the least possible. An excess of length adds to cost of construction, cost of repairs, and time and labor in traveling over it.

Every road should be as level as possible, and as a road can in few cases be at the same time straight and level, these two points will often conflict. In such cases straightness

should always be sacrificed to obtain a level or to make the road less steep.

The difference in length between a straight road and one which is slightly curved is very small; but even if it were much longer, it would be better to adopt the level and curved road, for on it a horse could safely and rapidly pull his full load, while on the other he would only carry a part of load up the hill and must diminish his speed in descending it. The horizontal length of a road may be advantageously increased to avoid an ascent by at least twenty times the perpendicular height which is thus saved; that is, to avoid a hill one hundred feet, it would be proper for the road to make such a detour as would increase its length two thousand feet. The mathematical axiom that "a straight line is the shortest distance between two points" is not a safe guide in road making, and less appropriate than the proverb that "the longest way around is the shortest way home."

From actual experiments it has been shown that on a level a horse can draw a full or maximum load, on a raise of 1 in 100 he can draw but 75 per cent. of a full load; on a raise of 1 in 24 he can draw but 50 per cent. of a full load and on a raise of 1 in 10 he can draw but 25 per cent. as much as on a level road.

Few existing roads are well located. They are built after the style of the Romans, going over hills rather than around them. All new roads should be laid out with a view of having them as nearly level as possible and in the reconstruction of old roads, locations may be changed and grades reduced to a minimum before the metal or broken stone is placed upon them. A road to be of the most practical use should never have a longitudinal slope greater than three per cent. and the transverse slope should be one-half inch to twelve inches.

One of the most essential and important things to be considered in the construction of good and permanent roads is the proper grading and drainage of the foundation or roadbed upon which the metal or broken stone is to be placed.

Great care should be taken to have the flat and round stones, as well as all rotten stone excluded; all courses to be well

watered and rolled. The two last courses should be of one texture. The qualities required in a good road stone are hardness, toughness, and ability to resist the action of the weather, and it is difficult to find all the qualities in the same stone. Trap rock is the best of road materials. Lime stone of the carboniferous and transition formation makes a very good road, having a peculiar quality of furnishing a mortar or cement-like detritus which binds the stone together and enables it to wear better than a harder material that does not bind. It is better economy to bring good materials from a distance than to employ inferior ones close at hand. Trap rock is ordinarily twice as durable as hard limestone, and four times as durable as soft limestone. It will therefore pay to surface a macadam road with crushed trap rock, even if it costs twice as much as limestone. Atmospheric influence has a great effect upon the durability of a stone; a rock that readily absorbs water will disintegrate quickly under the action of frost and is therefore useless as a road material.

Macadam earnestly advocated the principle that the whole science of artificial road making consists in making a solid, dry path on the natural soil, and then keeping it dry by a desirable waterproof coating. The broken stone is only to preserve the under road from moisture, and not at all to support the vehicles, the weight of which must be really borne by the native soil, which while preserved dry will carry any weight and does in fact carry the stone road itself as well as the vehicles upon it. The stone is employed to form a secure, smooth, water-tight flooring, over which vehicles may pass with safety and expedition at all seasons of the year. The offices of the stone are to endure friction and shed water, its thickness should be regulated only by the quantity of material necessary to form such a flooring, and will vary with the nature of the soil, of the material and the character of the travel over it; and it should be such that the greatest load will not affect more than the surface of the shell. The erroneous idea that the evils of an under-drained, wet, clayey soil can be overcome by a large quantity of material, has caused a large part of the costly and unsuccessful expenditures in making broken stone roads. If the

foundations of the road are kept dry and well drained 6 to 9 inches of broken stone well bonded will suffice to make a good and lasting road.

I wish to emphasize these points, which are in my opinion the key to success in macadam road building:

First. That the earth foundation be thoroughly drained and rolled with a steam roller before the broken stone be placed thereon.

Second. That the broken stone should be clean and free from loam and that clean rock screenings be used for binding.

Third. The use of a steam roller of sufficient weight, and the keeping of the stone and screenings well watered while being rolled.

The combination of good hard stone with good clean rock screenings and the skillful use of the roller will result in a roadway that is without voids in its lower surface through which mud could percolate from below, that is sufficiently compact to shed rain and has cohesive strength. The clean binding which is insisted on, prevents the movement of the stone among themselves and keeps their angles from wearing off.

JOSEPH W. HUNTER,
State Highway Commissioner of Pennsylvania.

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**Charles H. Batts
Says He Will Not Run
in Town Board Contests
in view of the Standard Highways
Manual Controversy.**

ALBANY, N. Y., Oct. 2.—Charles H. Batts, Ulster County committeeman from the 12th district, chief of the revision committee at Albany and compiler of the new highway manual, returned home yesterday from a hurried trip to Albany, and authority it is asserted that the highway manual scandal has been straightened out, with directions to keep it in the ground the rest of this campaign. As far now stand, county clerks and towns can comply with or ignore the Highway Manual law as they see fit, without any litigation or molestation from either Batts or Odell.

It is for the books will be presented to town boards, and non-payment will result in mandatory proceedings. The

Republican town board here in Ulster Batts's home town, without a dissenting vote, took the graft bill by the week ago and voted not to receive

it for the books. Following this, County Clerk Ledyard Cuyler, who is also chairman of the Ulster county committee, declined to pay Wayne county's quota of books, taking counsel, on the ground that

it could not hazard his or the county's

in footing the delivery charges.

The scandal has already scared the public and they have clamored for financial support of the most positive kind.

Leaders in Albany wanted to see the Batts, and he and Chairman Cuyler go Albany and the whole matter was squared out for this campaign. If the Ulsters control the Legislature next year the financial backers of Compiler will be reimbursed by special legislation some other old way. The quieting in this emergency was drawn from Ulster-Chairman Odell's campaign funds.

**Town Board of Milton Decline
Concerning Them Unconcerned**

Special to The New York Times

MILTON, N. Y., Oct. 6.—The law requiring towns to buy highway manual is unimportant. Town Board of Milton at a meeting yesterday adopted a resolution. County Clerk he notified that Milton declines to receive the books on the grounds that the books are not the town officers' responsibility. The County Clerk West this afternoon accepted 214 copies of highway manual because he had not noticed that no money had been ap-

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